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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EARL McPHERSON,

Defendant and Appellant.

F073896

(Super. Ct. No. CRF45012)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Nicco Capozzi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

Once a suspect invokes his right to counsel during custodial interrogation, the officer must immediately cease questioning and honor that right. In this matter, we hold that the interrogating officer failed scrupulously to honor defendant's right, rendering defendant's subsequent statements inadmissible. The trial court erred in admitting these statements and their admission was not harmless beyond a reasonable doubt. We must, therefore, reverse the judgment of conviction.

PROCEDURAL HISTORY

Defendant James Earl McPherson was charged with, and convicted by a jury of, continuous sexual abuse of a child under the age of 14 years, between September 10, 2013 and April 5, 2014 (Pen. Code, § 288.5, subd. (a)¹), as well as the commission of a lewd act upon a child between January 1, 2010 and March 31, 2012 (§ 288, subd. (a)). In a subsequent proceeding, McPherson admitted a prior strike enhancement allegation attached to both counts of conviction.

McPherson was sentenced to state prison for an aggregate term of 36 years. On the continuous sexual abuse count, the court imposed the upper term of 16 years, which was doubled on account of the prior strike enhancement, for a total term of 32 years. On the lewd act count, the court imposed one-third of the midterm of six years, which was doubled on account of the prior strike enhancement, for a total of four years.

FACTS

The charges against McPherson related to sexual molestation of his minor stepdaughter, H.A. During the relevant period, McPherson was married to H.A.'s mother, Jessica. The trial took place in February 2016.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

PROSECUTION CASE

Testimony of Jessica McPherson

Jessica met McPherson in 2005. At the time, Jessica had a three-year-old daughter, H.A. (H.A. was born in 2002). A year later, at the end of 2006, Jessica and McPherson were married and, in 2007, they had a son, H. The McPhersons lived in various places during their marriage. Initially, they lived in Sonora. In 2009, they lived in Prunedale, in Monterey County. They again lived in Monterey County, in Salinas, from July 2011 to March 2012 (during this period, H.A. spent weekdays with Jessica's mother in Escalon as she attended school there, but would return home for weekends and school holidays). From March 2012 to October 2012, the McPhersons lived in Arizona (H.A. continued to live with Jessica's mother for the first three months of this period in order to finish up the school year). In 2013, the McPhersons returned to California. Initially, they lived with Jessica's parents in Escalon, but moved to Sonora in October of that year. They remained in Sonora until April 2014, when Jessica filed for divorce. During the period that Jessica and McPherson were together, H.A. would see her biological father "[o]ff and on."

When Jessica and McPherson first got together, they had "a very good relationship," but, "[t]hree years into it," the relationship had deteriorated considerably because of McPherson's "anger issues." Jessica testified that McPherson would destroy their property by, for example, "putting holes in the walls and flipping [her] glass tables over." Jessica also detected a change in H.A. over this same period. H.A. was "bubbly and outspoken" and had "a really good relationship" with McPherson when McPherson first came into their lives. However, by the time H.A. was six years old, she became "really withdrawn from everybody" and began to consistently wet her bed (earlier, H.A. had only sporadically wet her bed). Jessica questioned H.A. about her uncharacteristically "shy and timid" behavior, and eventually even consulted a pediatrician to determine whether "anything was wrong." The doctor "said it was normal

behavior and [H.A.] just had night terrors and that the bed wetting would just go away eventually.” However, neither the night terrors nor the bed-wetting subsided.

Jessica did not suspect that McPherson was molesting H.A. because she “never would have thought of that to happen.” However, Jessica was concerned about McPherson’s preoccupation with porn. Jessica testified that McPherson was “into porn really bad,” both “adult porn and teen porn” and he had “videos [and] magazines.” She noted: “He would lock himself in the bathroom and ... masturbate.”

On April 7, 2014, when H.A. was in the sixth grade, Jessica came home from her job as a medical assistant at the hospital, picked H.A. up, and went to get pizza for dinner, for the family. During the drive, H.A. told Jessica, “I don’t like daddy anymore” and asked when they could move away. After some prodding, H.A. told Jessica that McPherson was “touching her at night.” More specifically, H.A. said that McPherson would touch her private parts while she slept during the night; he would turn her, reach under her underwear, and put his fingers inside.

Jessica testified: “We drove to the side of the road and I called 911 and then I called my sister because I didn’t know what to do.” Jessica then drove to her sister’s house, where they waited for sheriff’s deputies to arrive. Jessica felt “[h]orrible.” She explained: “I felt like a bad parent, because I should have known. And not knowing, I just felt really bad and just a lot of guilt.”

Sheriff’s deputies arrived and talked to H.A. They then escorted Jessica home to collect her son, H. When Jessica asked H. whether McPherson had ever touched him inappropriately, H. responded in the negative. Jessica eventually moved to Escalon, where her parents lived, and filed for divorce from McPherson.

At some point, law enforcement collected three comforters or blankets from Jessica. One was a black and purple blanket, with a peace sign. The second one was white and tan, with red and purple circles, along with birds. The third one was green and yellow fleece, with monkeys. These blankets were used only by H.A.; she used them

every night, whether she slept in her bed or on the couch. H.A. slept on top of the black and purple one with the peace sign. She used as a cover the white and tan blanket with circles and birds. She used the green and yellow fleece with the monkey design as an extra layer. McPherson did not use these blankets.

In the months leading up to H.A.'s disclosure in April 2014, Jessica's relationship with McPherson was "pretty bad," with "a lot of arguing." In fact, it had gotten to the point that around Thanksgiving 2013, McPherson began "sleeping out on the couch," and Jessica and McPherson were no longer having sex. Jessica and McPherson did not have sex during the period from Thanksgiving 2013 to April 2014. Jessica also clarified that she and McPherson never had sex on H.A.'s bed; nor did they ever use H.A.'s blankets to wipe themselves after having sex.

Jessica acknowledged she frequently texted McPherson in the months after she separated from him (following H.A.'s disclosure of abuse). Sometimes Jessica and McPherson would discuss H, their son. On October 21, 2015, a year and a half after H.A. disclosed the abuse, Jessica possibly texted McPherson a relatively recent photograph of herself, H., and H.A.

Testimony of Tuolumne County Sheriff's Deputy Samuel Egbert

Deputy Samuel Egbert, a veteran officer with the Tuolumne County Sheriff's Department, met with Jessica on April 7, 2014, after she called 911 to report sexual abuse of a child. Jessica was "upset, crying, [and] visibly shaken." Jessica said her daughter "had been sexually abused" by McPherson. Jessica told Egbert that H.A. had told her that McPherson "touched her while she was sleeping in the living room." More specifically, H.A. had said McPherson "reaches under her underwear and puts his fingers inside." H.A. indicated this had been happening since around 2009.

As for H.A. herself, Egbert testified she "appeared very withdrawn, [and] quiet." H.A. told Egbert "her daddy had touched her," explaining that "he reaches under her

underwear and touche[s] her in her private areas.” H.A. noted these acts occurred “a lot,” but could not be more specific as to their frequency.

H.A.’s Kids Interview Team (KIT) Interview

The prosecutor played a video recording of H.A.’s KIT interview for the jury. Danielle Brouillette conducted the interview, which took place on April 10, 2014. H.A. told Brouillette that her “stepdad” had “touched [her] during the night,” under her clothes, on her “private [part].” H.A. added: “I let him finish but I was just scared. And I wanted him to go away.” H.A. said this last occurred on April 3 or April 4, 2014. Asked for more details about that incident, H.A. said: “I was in the living room watching TV and I passed out on the couch. [¶] ... [¶] The next thing I remember was waking up to him touching me. And then I—and then I started kicking so he would go away. And he went away.”

H.A. also explained: “[H]e’s touched me quite a few times. It was just that I was too scared to tell my mom.” H.A. said, “that’s the only thing that he does.” H.A. clarified McPherson would not say anything during these encounters and had never asked her to touch him. Nor had he talked to her about the incidents afterwards. The abuse started when H.A. was eight or nine years old and the family was living in Monterey. H.A. eventually revealed the abuse to her mother.

When asked to describe an earlier incident of abuse, H.A. said, “it was before Christmas,” “sort of a long time ago.” She explained: “I was in bed sleeping with my mom because my dad was sleeping in the living room. So I slept with my mom. [¶] ... [¶] And then she left and—I think—pretty sure she left. I think she went to work early in the morning. And then—yeah—he touched me—kept touching me. I don’t remember everything though.” H.A. iterated that McPherson did the same thing every time, adding: “Well he just puts his hands under my underwear and he touches my ... private.” H.A. said that she had a very high bunkbed, with room only for her to fit in; consequently, the abuse would only occur if she slept on the couch or in her mother’s bed. Most of the time

she would sleep in her bunkbed. McPherson had touched her on two occasions when she was on the couch.

H.A. remembered one time that McPherson had touched her when the family lived in Monterey. H.A. said: "I think [me] and my brother were sleeping on the [floor] in our room. We had a TV in there. We were sleeping on the [floor] once a week on the weekend. And we were sleeping on the [floor] watching TV and we fell asleep [¶] ... [¶] And he came and touched me during the night again."

H.A. remembered another incident that took place "a long time" ago. H.A. and her young cousin, M., were watching TV as they lay on a couch in the bedroom of H.A.'s mother, who was working a night shift at the hospital. As the girls were falling asleep, H.A. saw and "felt [McPherson] touching [her]." So she "got up and acted like [she] was going to the bathroom." H.A. made sure that McPherson never touched her cousin or any of her friends, as she would stay up to watch over them to preclude that possibility.

H.A. said she also did not like McPherson because he "yells a lot and he cusses at [her] mom," "says the bad words a lot of times around [the house]," and "tells [H.A. and H.] to go do stuff that he's supposed to do."

H.A. did not tell her mother about the abuse earlier because she "was too scared" to do so. H.A. was concerned about the possibility that McPherson, who is "a violent person," would hurt her mother. H.A. had seen a picture of McPherson at a prison and had "a feeling" that he was a violent person. Upon further questioning, H.A. said McPherson had "smacked" her on her bottom with a belt once and, another time, had shaken H. and thrown him on the couch.

H.A.'s Testimony

H.A. was 13 years old and a student in the eighth grade when she testified at trial. H.A. testified her relationship with McPherson "at first was very good," but deteriorated when she was six or seven years old. At that point, McPherson "started to touch [her] inappropriately underneath [her] clothes" "[p]robably two times a month," when H.A.'s

mother was away working “night shifts.” Her mother only worked the night shift when she worked at Sonora Regional Hospital.

H.A. told her mother about the inappropriate touching on April 7, 2014. H.A. described two incidents—occurring around Christmas 2013 and January 2014, respectively—when McPherson had touched her. H.A. was 11 years old when these incidents occurred. Regarding the Christmas 2013 incident, H.A. testified: “I remember I was sleeping with my brother, and I remember he walked in ... and he started touching me inappropriately again and I tried to kick so he would go away, but he did not.” H.A. clarified that McPherson would “touch underneath [her] clothes on [her] vagina” with his hands while her brother, H., slept. As for the January 2014 incident, H.A. testified: “Me and [my cousin, M.,] were sleeping on my mom’s bed, and he came in and started touching me again. I scooted closer to [M.] because I didn’t want him to touch her.” He touched her in the same way as H.A. had explained earlier. H.A. generally had her “back to him” and he “would reach over” her to touch her vagina. During the January 2014 incident, M. remained asleep. H.A. said both these incidents occurred in the McPhersons’ house on Beauchamp Street in Sonora. H.A. had her own bedroom in that house. She also had her own bed, but sometimes slept on the family couch. H.A. identified a blanket with birds on it, along with a coordinating bedsheet, as hers. She used the blanket whether she slept in her bed or on the couch. She did not think anyone else used the blanket. McPherson “had his own” blanket.

H.A. described a few other incidents with McPherson (in addition to the two she described earlier). One incident happened shortly before H.A. disclosed the abuse to her mother. H.A. was on the couch and McPherson touched her in the same way as previously described. Another incident occurred in 2011, in Monterey; at the time, H.A. was living with her grandmother during the week to attend school but would return home on weekends. One night, when H.A. was home, “[she] was sleeping on [her] bed and [McPherson] started touching [her] inappropriately again.” H.A. testified McPherson

would touch her “vagina.” She was “pretty sure” this happened more than once at the Monterey apartment.

Although H.A. eventually decided to disclose the abuse to her mother, she was “scared to at first” because she was scared McPherson “would hurt [her] or something.” She explained McPherson “was, like, really aggressive and he would always yell.” H.A. clarified that although in her KIT interview she had said the abuse started when she was eight or nine, she had thought more about events and now was “pretty sure [she] was six or seven.”

Since her KIT interview, H.A. had only spoken about the abuse with her “closest” friend. She did not like talking to her mother or grandmother about it.

Testimony of Tuolumne County Sheriff’s Detective Brandon Lowry

Tuolumne County Sheriff’s Detective Brandon Lowry testified he was a “KIT Investigator,” which position “encompasses crimes committed against children.” Lowry was assigned to investigate H.A.’s case. During the investigation, on approximately April 28, 2014, the sheriff’s office collected H.A.’s bedding from Jessica and sent it to the Department of Justice for testing for the presence of seminal fluid. At the time, Jessica estimated she had last washed the bedding approximately “two to three months” ago. Jessica also clarified H.A. slept on top of one of the comforters or blankets—a black one with a peace sign—and used the others as covers. Lowry noted that neither H.A. nor Jessica ever indicated that H.A. saw McPherson’s penis or saw him masturbate or ejaculate (nor was there any allegation that McPherson digitally penetrated H.A.). H.A. indicated only that McPherson would put his fingers in her underwear.

During the investigation, Lowry contacted McPherson approximately three times; McPherson “was now living in Monterey County.” Lowry testified: “I told him that I had an investigation that I needed to speak with him about and asked if we could make arrangements for him to come up to my office to speak with me. The first time I spoke with him, he was having significant car troubles and transportation issues.” Lowry said

McPherson's "transportation issue" continued for a few months. Eventually, in August 2014, Lowry turned up the pressure on McPherson: "I told him that I was upset that he had not come up yet and we hadn't been able to wrap this up yet. Told him that if he was unable to come up, then I was going to drive down and go to him." Lowry also advised Jessica regarding her role in the investigation: "I kind of told her to keep, what I call, the status quo; just however their relationship was before. Keep it going until I was able to talk to him so that he wasn't completely tipped off or anything like that."

McPherson met with Lowry in August 2014 at the sheriff's investigations office in Sonora. Lowry had substantial experience in conducting police interrogations. In order to put his interrogation of McPherson in context for the jury, he discussed standard techniques of police interrogation, including a technique called "minimization," which is designed to encourage suspects to talk freely during an interrogation. Lowry explained what "minimization" entails: "Number one thing is the wording we use. Instead of using the word murder, we'll use the word hurt. Instead of using the word rape, we use the word sex or something like that." He added: "[Another technique] we use, whatever [crime] they have been alleged [to] have committed, we try to provide them with an example of somebody who's done something worse." Thereafter, the prosecutor played a video recording of Lowry's interrogation of McPherson at the sheriff's investigations office.

Lowry testified that at the end of the interrogation at the sheriff's investigations office, he arrested McPherson and "had a patrol deputy transport him" to jail for the booking process. Lowry subsequently went to the jail himself. He saw McPherson in a holding cell. Lowry testified: "I could see him in the window [of the holding cell] and he was motioning and looking at me motioning for me to come over to him." Lowry testified he went over to talk to McPherson and turned on his audio-recording device. The audio recording of the interaction between Lowry and McPherson at the jail was then played for the jury.

The substantive content of Lowry's interactions with McPherson at both the sheriff's investigations office and the county jail is recounted later in this opinion.

Testimony of Liz Schreiber, Biologist at Department of Justice Crime Lab

Liz Schreiber, a biologist with the Department of Justice Central Valley Crime Lab in Ripon, testified for the prosecution as an expert on identification of biological samples for the purpose of DNA testing. She screened the bedding from H.A.'s bed for human bodily fluids using "an alternate light source" that causes saliva and semen stains to fluoresce. Schreiber tested a comforter with a peace sign on it as well as one with birds on the top side and circles on the reverse side. The comforter with the peace sign did not reveal the presence of any bodily fluids. However, Schreiber detected numerous bodily fluid deposits on the comforter patterned with birds and circles. There were 28 deposits on the top side of this comforter (bird pattern) and 13 deposits on its reverse side (circles pattern). Once all the stains tested presumptively positive for semen by means of a chemical test, Schreiber lifted "cellular material" from one stain on the top side of the comforter and one stain on the reverse side, placed the cellular material onto slides, analyzed the slides under a microscope, and confirmed the presence of sperm in both underlying stains. She then concluded, by extension, that all 41 stains on the comforter were semen stains.²

Schreiber, who had significant training and experience in analyzing male ejaculation patterns, opined the semen stains on the comforter appeared to have been deposited on multiple occasions. In this context, she considered the facts that the staining was voluminous and that "[t]he average ejaculate is approximately three quarters of a teaspoon." Her opinion ultimately was based on the "multitude" and shapes of the stains:

² The police had also provided a third comforter to the crime lab for testing. However, after semen was detected on the comforter with the birds and circles, Schreiber opted not to test the third comforter. She explained that the crime lab has a heavy caseload and there is "not enough time or money" for exhaustive testing in every case.

“[T]ypically, a semen stain is not going to be a stain that would be the size of a urine stain which we see often ... on children’s bedding. The stains are typically the size of a silver dollar or maybe a little bit larger. You have to take into consideration, however, that [once] semen gets onto fabric, it’s going to wick into that fabric. It’s going to spread. So even if the stain were let’s say the size of a quarter when it was initially on the fabric, it may dilute out or difuse [*sic*] out into the fabric a little bit. Most of these stains were pretty distinct stains. Some were in the size of a silver dollar; some of them were a little bit larger; some were a little bit smaller.”

Schreiber further opined that the fact the stains had “defined” edges was not consistent with a female using the comforter or blanket to wipe off after intercourse. She explained her reasoning: “When somebody uses either a shirt or a pair of shorts or pants or bedding to wipe themselves off after semen has been deposited, you would see wipe marks through the fabric. The fabric often gets stuck on itself from someone gathering it to wipe themselves with it. None of the stains that I observed appeared to be wipes. They all appeared to be distinct stains that were deposited directly onto the blanket.”

Schreiber testified the comforter was “smelly and dirty,” noting that the white parts of the comforter appeared off-white as a result of it being unclean. When asked whether washing the comforter would have removed the semen stains, Schreiber answered: “[It depends on whether] the stains have set; how—whether or not hot water is used or cold water; whether or not soap is used; whether or not [the stained] items ... are put into the washing machine alone or whether or not they are crammed in there with a multitude of other items.”

Testimony of Pin Kyo, DNA Analyst at Department of Justice Crime Lab

Pin Kyo, a DNA analyst with the Department of Justice Central Valley Crime Lab in Ripon, testified for the prosecution as an expert in DNA analysis and interpretation. Kyo performed DNA analysis on samples provided by the Tuolumne County Sheriff’s Office in the criminal case against McPherson.

Kyo testified: “For this particular case, there are two different stains that I tested from the comforter which was previously examined by ... Liz Schreiber[,] who testified for you earlier. I got one stain from one side, the other stain from the other side of the comforter. I did the DNA analysis on those two stains.” Kyo also had a “reference sample” in the form of a cheek swab from McPherson, as well as reference samples from both Jessica and H.A. Kyo explained: “So in my DNA analysis, I got the DNA type for the three individuals that I have talked ... about earlier. Then I also analyzed two evidence samples from the comforter. So for each evidence sample—because this is a semen [stain], in order to analyze the semen stains, I did what is called differential extraction. So for [each] sample, I was able to separate out the semen or sperm fraction separate from the non-sperm fraction like your skin cells an[d] all the other non-sperm related DNA. So for [each] sample, I got two different results. One is for the sperm fraction [and] the other one is non-sperm fraction.”

Kyo then compared McPherson’s DNA profile with the DNA profiles generated from the semen stains on the comforter. She explained the results of these comparisons: “For one of the semen stains on the multi-colored side of the comforter, both the sperm fraction and the non-sperm fraction [profiles] is the same as Mr. McPherson’s DNA profile. [¶]... [¶] ... For the second stain from the tan-colored side of the comforter, the sperm fraction came back to Mr. McPherson’s DNA profile, but the non-sperm fraction, it is a mixture of at least three individuals. It was a low level, so I was not able to ... do any interpretation on that.” She explained that the non-sperm fraction could encompass DNA from seminal fluid, saliva, sweat, and epithelial or skin cells, among other things. Based on statistical analysis, Kyo further opined that the sperm in the stains on the comforter was McPherson’s sperm to a scientific certainty.

DEFENSE CASE

The defense called a total of four witnesses: David McPherson (McPherson's brother), Stacie McPherson (McPherson's stepmother), Jessica McPherson, and McPherson himself.

Testimony of David McPherson

David McPherson was McPherson's younger brother. David lived in Monterey and worked as a plumbing contractor. In 2006 or 2007, he lived for six months in Twain Harte with McPherson, Jessica, and H.A.; H.A. was around five years old at the time. Even when David and McPherson lived separately, they saw each other regularly. David would often visit McPherson and his family on weekends. David noted that H.A. had a bed-wetting problem "her whole life." David further observed that the McPhersons had "a normal family environment" in their home. H.A. was "always ecstatic to see [McPherson] when he would come home." She would "run to the front door" to give McPherson hugs.

Testimony of Stacie McPherson

Stacie was McPherson's stepmother of 20 years. She lived in Arizona. McPherson and his family had lived with Stacie a couple of times, in 2008 and 2012. With regard to the periods that McPherson and his family lived with Stacie, Stacie testified H.A. and McPherson had a great relationship. H.A. was always excited when McPherson came home from work. She never appeared afraid of him in any way.

In 2008, during the first period that McPherson and his family lived with Stacie, Jessica told Stacie that H.A. "had been wetting her bed for a long time and had accidents quite frequently." Jessica indicated that this problem stemmed from the fact that H.A.'s biological father had touched her inappropriately. As a result, Jessica would not allow H.A.'s biological father to be around H.A.

Testimony of McPherson

McPherson testified on his own behalf. McPherson categorically denied he had ever put his hands inside H.A.'s underwear and touched her vagina. He testified: "I loved [H.A.]. I took her in as my own daughter. I never seen her as anything but that."

McPherson further testified his relationship with Jessica had begun to break down in 2008 or 2009, although the two remained married until 2014. McPherson and Jessica used to have loud arguments in front of the children. The final nail in the coffin was an argument between McPherson and Jessica's parents in October 2013. In short, by the time H.A. made the molestation allegations, the marriage was already "pretty rocky." However, well after McPherson was arrested and charged in the instant case, Jessica continued to text him, even sending pictures of herself and the children.

The prosecutor cross-examined McPherson with extensive reference to statements he made during two rounds of interrogation conducted by Detective Lowry. This aspect of McPherson's testimony is addressed in detail later in this opinion. McPherson was also impeached with three prior felony convictions for felony assault, first degree burglary, and conspiracy to commit assault and burglary, respectively.

Testimony of Jessica McPherson

Jessica testified she would text McPherson during the period leading up to the trial. She identified a text message she had sent to McPherson around October 2015. In the text message, Jessica wrote, "[H.A.] just has no respect and thinks [she does not] have to listen whatsoever or do chores and lies about homework. It's so damn frustrating. My dad took her phone away that he got her. I'm going to start giving it back to her and she's going to be grounded a lot. I just about had it."

Jessica testified she kept in touch with McPherson because she was scared of him. Jessica also testified that H.A. had not discussed the molestation allegations with her since the day she first revealed the abuse. Jessica further testified she and McPherson did not have sex on H.A.'s twin-size "bird comforter." Finally, Jessica testified she had no

concerns about H.A.'s biological father touching H.A. inappropriately. She denied she had told Stacie McPherson otherwise.

PROSECUTION'S REBUTTAL

Testimony of Pamela Galbreath (Jessica's Mother)

Pamela Galbreath, Jessica's mother, testified as a rebuttal witness for the People. Galbreath testified that when the McPhersons lived in Salinas, H.A. stayed with Galbreath during the week. H.A. was finishing up the fourth grade. During that period, H.A. had "bed wetting issues" and "extremely bad night terrors." "She would wake up in the middle of the night just screaming and curled up in a ball in a corner." Galbreath testified that H.A. would spend the weekends, holidays, and vacations with her parents. When the time came for the weekend visits, H.A. "would beg [Galbreath] not to take her."

In October 2013, when the McPhersons were living with Galbreath, Galbreath's boss gave H.A. the comforter with the bird motif. Galbreath explained: "[The boss's] daughter went off to college and they redid her room, so they ... gave H.A. [their daughter's old comforter]." Shortly thereafter, Galbreath had an argument with McPherson and the McPhersons moved to Sonora. The McPhersons took the bird-motif comforter, which was stored in a plastic bag at Galbreath's house, with them to Sonora.

DISCUSSION

I. Admissibility of McPherson's Custodial Statement to Detective Lowry at the Jail

McPherson gave a video-recorded statement to Detective Lowry at the Tuolumne County Sheriff's Investigations Office as well as a subsequent audio-recorded statement while he was in custody at the Tuolumne County Jail. In a motion in limine, defense counsel objected, on *Miranda* grounds, to admission of both statements, but the trial court ruled the statements were admissible. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)). The People played recordings of both statements in their case-in-chief. McPherson now argues the court's admission of the custodial statements he made at the

jail was prejudicial error, requiring reversal of his convictions.³ We agree that McPherson's statements at the jail are inadmissible under *Miranda* and its progeny cases, specifically *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*) and *Davis v. United States* (1994) 512 U.S. 452 (*Davis*). Accordingly, we must reverse the judgment of conviction.

A. Background

1. Evidence Code Section 402 Hearing on Admissibility of Statements

As stated above, at trial, defense counsel objected to admission of McPherson's statements to Lowry on *Miranda* grounds. Counsel filed an in limine motion asserting that Lowry failed to honor McPherson's invocation of the right to counsel guaranteed by *Miranda*. The trial court reserved ruling on the in limine motion pending an Evidence Code section 402 hearing. The People called Lowry to testify at trial about his investigation into H.A.'s allegations, including the statements he obtained from McPherson. Before Lowry testified at trial, the court held an Evidence Code section 402 hearing to evaluate the admissibility of the interrogation statements he had obtained from McPherson.

At the Evidence Code section 402 hearing, Lowry testified that, after he was assigned to investigate H.A.'s allegations against McPherson, he contacted McPherson a number of times to urge McPherson to meet with him in connection with the matter. Eventually, on August 13, 2014, McPherson came to the sheriff's investigations office in Sonora to meet with Lowry. Lowry talked to McPherson in an interview room, the door to which was closed but not locked. Lowry advised McPherson that he was not under arrest or being detained. Lowry then proceeded to question McPherson regarding the matter at hand.

³ See footnote 6, *post*.

Approximately 20 to 25 minutes into the interrogation, McPherson said, “I think I want to talk to an attorney” and “I think you’re accusing me of something.” Lowry halted the questioning and left the room to talk to his partner, who told Lowry about the existence of an outstanding misdemeanor warrant, issued by animal control, for McPherson’s arrest. Lowry returned to the interview room and executed a search warrant for a DNA sample from McPherson. Lowry also decided to arrest McPherson on the outstanding misdemeanor warrant, upon verification thereof.

McPherson wanted to smoke a cigarette at this point, so Lowry accompanied him outside. During this break, Lowry’s partner was able to verify the misdemeanor warrant from animal control. Lowry then arrested McPherson on the warrant and “contemporaneously” read him the *Miranda* warnings (this was the first and only time that McPherson was read the *Miranda* warnings).⁴ Thereafter, Lowry had another deputy transport McPherson to the nearby county jail.

Lowry then himself went over to the jail. He testified: “When I entered the jail, I had the appropriate paperwork for booking, both for the [animal control] warrant and then also for our case.” The prosecutor and Lowry then had the following exchange:

“Q. [What happened at the jail?] [¶] ... [¶]

“A. [If] I recall, [McPherson] was down in a holding cell, one or two, and I remember looking over at the window and recall him motioning—looking at me and motioning for me to come over to him.

“Q. And did you go over?

⁴ Lowry testified that once the misdemeanor warrant was verified, McPherson “didn’t have the right to leave” and Lowry “contemporaneously read him his [*Miranda*] rights.” This interaction occurred while Lowry and McPherson were outside, smoking cigarettes, and is not reflected in the video recording of the interrogation. When they reentered the interrogation room, the discussion turned to transporting McPherson to jail to be booked and McPherson was also handcuffed. The record is, therefore, clear that McPherson was placed under arrest on the misdemeanor warrant during the cigarette break, outside the interrogation room and that he was contemporaneously *Mirandized*.

“A. Yes.

“Q. And what did he say to you, if you recall?

“A. Um, initially I told him that he was under arrest for the [animal control] warrant that we had discovered and subsequently told him that I was going to arrest him also for the child molestation charges. I advised him of that.”

Lowry further testified that some discussion then ensued regarding the specific child molestation charges that Lowry had just mentioned to McPherson. Thereafter, although Lowry reminded McPherson about his prior *Miranda* advisement, McPherson agreed to further interrogation by Lowry.

Following Lowry’s testimony at the Evidence Code section 402 hearing and after hearing argument from the parties, the trial court ruled that *Miranda* advisements were not necessary at the *outset* of the interrogation at the sheriff’s investigations office because McPherson was not in custody during that interrogation. As for McPherson’s request for an attorney during that interrogation, the court ruled “it was an ambiguous assertion of *Miranda*.” The court continued: “But nevertheless, Detective Lowry honored it as an invocation of *Miranda* rights and [ceased] questioning [McPherson]. The subsequent comments—statements by Mr. McPherson at the jail were certainly volunteered and *Miranda* would not apply to those statements volunteered by Mr. McPherson after he was admonished of his—or given his *Miranda* rights.”

After the court ruled that the statements McPherson gave to Lowry at the sheriff’s investigations office and the jail, respectively, were admissible, the People played the recorded statements for the jury.

2. Synopsis of McPherson’s Interrogation at Sheriff’s Investigations Office

As noted above, McPherson met with Lowry at the sheriff’s investigations office on August 13, 2014. McPherson’s girlfriend, Krystle, had driven him to Sonora from the Seaside area, where McPherson was living at the time. Lowry advised McPherson at the

outset: “Just so you know, um, you are not under arrest. You’re not being detained, okay?” Lowry asked for McPherson’s help to “wrap up this case.”

McPherson told Lowry his highest education level was “G-E-D” and that he “[built] houses for a living,” working in “carpentry and drywall and finish work.” Lowry asked McPherson about his reaction when Jessica first told him “back in April” about H.A.’s allegations. McPherson responded: “Um, I ... was shocked. I had told her I didn’t know where that was comin’ from or why she was saying that ‘cause I mean literally before all this happened, before my ex—or whatever happened—I don’t know what was said between those two when they left the house, but right before that she was just hangin’ out with me. We were workin’ on my truck. That’s why I—I don’t know where that came from or anything.” Lowry asked McPherson who would have touched H.A. in that way. McPherson responded, “I don’t think anybody did.” Lowry then asked, “Tell me why you’re not the one who did this.” McPherson responded: “‘Cause I was her father. I mean I felt I was her father. I was around her since she was two and a half. I’ve never felt anything but love for that kid. I mean I raised her, man. I mean I—she was like my daughter to me. I mean I spent every—I mean I ... wasn’t the greatest dad. Yeah, yeah, I’ll admit I was [an] asshole sometime[s], but I love that girl with all my heart. I still do and it sucks that I can’t talk to her, that I can’t see her.” McPherson agreed to take a polygraph test. When Lowry asked him what the results of the test would be, McPherson answered: “Never taken one. I’m pretty sure it’d be fine.” McPherson also agreed to give a DNA sample, noting, “I’m already on file.” When Lowry said he needed “a new sample,” McPherson said: “I’ll give ya a DNA sample.

Lowry advised McPherson that H.A., in her KIT interview, had said, “[McPherson] would touch me with his hand and it would scare me,” and “‘It was pretty much the same thing every time. He would put his hands down my underwear and he would touch my privates.’” Lowry added: “And what I said before about, you know, I—we’re not here to just throw people away. I genuinely like getting people help. I am

like the first guy to be huge on second chances. The only speed bump is we just have to get through this right now is what we got to do. So I'm just asking you if you wouldn't mind having a conversation with me about what happened. How it would transpire. What feelings you were feeling. Maybe a little bit about your past and what happened to you maybe. I would like to talk to you about that. Like I said, don't beat yourself up. It's not the worst thing that's ever happened. You're not even close to being, you know, a monster. And it's not a façade. I genuinely want to help. I really do."

McPherson answered: "I'll give you the DNA sample and I think I want to talk to a lawyer, 'cause it sounds like you are already accusing me of doing something." Lowry responded: "And I'm not gonna ask you any more questions, unless you are comfortable doing that, but I do want you to know that you're not going to get another opportunity to share your side of what happened and for you to put your input in this case. You're not going to [be] afforded another opportunity to do that. You know what I mean, like make sense of things" McPherson said: "I've given you the only input that I have so I don't [know] what other input I could give you unless you have more questions about where we lived or how—what did we [do] together or anything like that."

At that point, Lowry walked McPherson through providing a DNA sample by swabbing his cheeks. Lowry then left the interrogation room, stating, "I know it's hard to believe but I truly am here to help" and "I'll be right back."

A little later, McPherson knocked on the door and asked to smoke a cigarette; Lowry accompanied McPherson outside for this purpose. At this point the recording was cut off. The recording recommenced when McPherson and Lowry returned to the interrogation room. The ensuing discussion indicated that, during the cigarette break, Lowry had arrested McPherson on an outstanding "book and release" misdemeanor warrant from animal control and given him *Miranda* warnings. (These events, including Lowry's *Miranda* advisement to McPherson, were not recorded as they took place outdoors, during McPherson's cigarette break.)

After the recording recommenced, Lowry directed another deputy to go tell Krystle, McPherson's girlfriend, to pull around to an inner parking lot, so McPherson's wallet and other personal items could be handed to her (Krystle had been waiting in the car during McPherson's interrogation). Lowry took McPherson's personal effects in order to turn them over to Krystle, as McPherson was to be transported to jail.

Lowry and McPherson then had the following exchange:

"Q: All right. So while you were outside I obviously read you your *Miranda* Rights. With those Rights in mind is it your official—official statement that you do not want to talk to me and that [you] want to get a lawyer.

"A: *I would at least like to talk to one first, yes.*

"Q: Okay. If you had a lawyer regarding our case, would you be willing to talk to me in the presence of a lawyer? I just—I'm keeping my mind open.

"A: Yeah, probably. I mean, I ... *I wanna talk to a lawyer and see...*

"Q: Do you have a lawyer?

"A: No I don't. I have a fam—a lawyer that's in the family that I was gonna talk to—yeah.

"Q: Okay. All right. [My partner] was bringing [Krystle] down there. *We'll let, uh, her know. Is it ([Krystle])?*

"A: Yeah.

"Q: All right. *We'll let her—I'll write out some directions and everything of where the jail's at and, you know, and...*

"A: Okay.

"Q: ...*luckily it's not too far away so let's get this [book-and-release] warrant taken care of.*

"A. Alright.

“Q: Because, you know, if you’re down driving around and you get stopped for that, you know, then you’re...

“A: It’s like I said. I came up here—I don’t know – it was before I talked to you ‘cause they had told me, uh—a friend had told me—that they had a warrant out for me and I never received—I have a—I forwarded my address in the mail and everything and I never received anything. I called them. They said, ‘Yes.’ I set up a court date. I came up here, went to court

“Q: I don’t know when [the warrant] was issued. I just know that there is one.

“A: Okay.

“Q: In fact, when I went out there on one of my last breaks they let me know so that’s not why I called you over. This wasn’t a—a big trap for a misdemeanor warrant.

“A: Oh, I understand.

“Q: I hope you know that.

“A: Yeah.

“Q: Alright, go ahead and stand up, turn around. [Lowry handcuffed McPherson]

“A: I’m almost positive it’s ‘cause I missed my first payment on the fine.

“Q: Oh that could very well be ... any of that stuff. It’s just not our warrant. It’s, uh—it’s, uh...

“((Crosstalk))

“Q: ...uh, Animal Control. [¶] ... [¶] Okay. We’re gonna get a, uh—our cars don’t have cages or the cut-outs or anything like that so I’m gonna have a patrol unit come over real quick and just give you the quick transport. Have a seat and I’ll be right back. [¶] ... [¶] All right. There’s a unit en route here. We—luckily have one [available].

“A: *Were you able to talk to [Krystle]?*

“Q: *E—she’s down there. My partner did.*

“A: *Is she freakin’ out or...*

“Q: *I—I don’t know that yet.*

“A: Oh.

“Q: I don’t know that.

“A: K.

[Other deputy enters]

“Q1: All right. James, go ahead and stand up[.]

“A: Yeah.

“Q2: I’m gonna switch these cuffs out real quick on ya.

“A: *Okay. Were you able to talk to [Krystle]?*

“Q1: Say again?

“A: *Were you able to talk to ([Krystle])?*

“Q1: Yeah. *She pulled around, uh—I went out and told her to pull around and told her, you know, you have a misdemeanor warrant for a dog being loose or something silly like that.*

“A: Okay.

“Q1: *So [Lowry is] out there further explaining what’s going on right now.*

“A: *Very cool, thank you for talking to her.*

“Q2: *So Detective Lowry coming to do the booking for the warrant?*

“Q1: Yeah. [¶] ... [¶]

“Q2: James? All right James. I’m Deputy Benson. I’ll be your transport deputy.” (Italics added.)

3. McPherson’s Interrogation at Tuolumne County Jail

Lowry’s testimony at the Evidence Code section 402 hearing on the admissibility of McPherson’s statements, as well as the recordings of his interactions with McPherson

at the sheriff's office and the county jail, indicates that *after* McPherson was taken to jail, Lowry talked to McPherson's girlfriend Krystle, evidently to apprise her of developments, and thereafter went to the jail to book McPherson, ostensibly on the misdemeanor warrant.

When Lowry was at the jail to complete the booking paperwork on the warrant, McPherson beckoned him over to a holding cell at the front of the jail, where he was temporarily confined. Lowry testified that he activated an audio-recording device as he went over to the holding cell to talk to McPherson. The recording and transcript of Lowry's interaction with McPherson at the jail reveal that McPherson beckoned Lowry over in order to confirm that Lowry had talked to Krystle and to ascertain what Krystle's plans were.

The first thing McPherson said to Lowry was: "I'm just, uh, [wondering if] you were able to talk to ([Krystle]) and what happened[?]" However, rather than properly answering McPherson's question, Lowry changed the direction of the conversation to explain that instead of booking and releasing McPherson on the animal control misdemeanor warrant as planned, Lowry was going to arrest McPherson for "child molestation charges." Specifically, Lowry answered McPherson's question as to whether Lowry was able to talk to Krystle as follows: "Yeah, I was. And I got to tell you, uh, *I'm gonna let you know that between then and now I made—I changed my mind.* You are being arrested for, um, child molestation charges on, uh, on [H.A.]. The only reason or one of the main reasons is, one, is I do have enough evidence to move forward with it and, two, I've take[n] into consideration you don't live in the county, so, you know, potential flight risk, stuff like that. But you are being charged with, uh, Sections 288.5 [continuing sexual abuse of a child] and 288[, subdivision (a)] [lewd or lascivious act on a child]." (Italics added.) After Lowry told McPherson of the new charges, there was a brief discussion between Lowry and McPherson about the offenses encompassed by the

code sections mentioned by Lowry, whether they were felonies, and whether they were bailable.

Lowry also told McPherson that he came to the jail specifically to tell McPherson that he had changed his mind and intended to arrest and book McPherson on felony child molestation charges. Lowry said: “I told you I’m a real straight up guy. I told them not to tell you. *I wanted to come down and tell it to your face.* ‘Cause that’s—that’s how I roll. That’s what I do. [¶] ... [¶] ... I didn’t make that decision until after we were done talking and I reviewed the case more, *which is why I’m standing here telling you now ‘cause I didn’t want to be all chicken shit and just have them throw a piece of paper at you and tell you I did it without telling you to your face.*” (Italics added.)

Lowry then segued into an attempt to get McPherson to address substantive issues in the case. Specifically, Lowry said: “I know I read you your *Miranda* rights earlier, but at the same time if you still, you know, want to make—help me make sense of all this, I’m still willing to listen, but I just need you to remember that. Shit happens, man. Life happens. This ain’t the end of it all.” (Italics added.) McPherson then blurted out: “*If I did that, I don’t remember doing it.* I remember I would go in there and kiss her good night and I’d hug her and I’d lay with her every once in a while, but I don’t remember doing anything else besides that. I don’t know where the touching is coming in. I don’t—I don’t know. This is so fucked, man.” (Italics added.)

Thereafter, Lowry and McPherson had the following exchange:

“Q: If you want to give me a moment, I’ll share with you a little bit more of the evidence that I have.

“A: (Unintelligible)

“Q: Only if you want to talk to me a little about [it], though.

“A: ‘Cause you’re the only one I got to talk to right now. What did ([Krystle])—what did you tell my girlfriend ([Krystle])?”

“Q: I told her that, you know, *it wasn't just a book and release, um, warrant anymore, that I was actually gonna be arresting you for the charges in my case.* I didn't tell her what the charges were. I just told her that, you know, what I do. I mean if you're arrested, it's a matter of public record, but I didn't go into the case at all 'cause that just sacrifices the integrity of my case. And to be all honest with you, it's only the people's business who you want it to be....

“A: So if I'm convicted on this, how long am I gonna be away from my family for?

“Q. I can't even begin to tell you, man. I mean I've seen—I've seen the spectrum—there's no way I can give you an idea of that. I've seen very little time. I've seen very big time. [¶] ... [¶]

“A. What else did you want to talk to me about then?

“Q. Do you want to talk to me?

“A. I don't care, yeah.” (Italics added.)

Lowry then questioned McPherson closely and in detail about the semen discovered on one of H.A.'s blankets. McPherson said: “[N]obody had like set bedding. We all used different bedding. The only one that [had] set bedding was my son ([H.]) because he had the SpongeBob one that only fit on his bed. Everybody else just used whatever blankets were clean.” When Lowry asked whether the semen on the blanket would match the DNA sample McPherson had just given, McPherson responded: “I'd say it probably is. If—if there's semen on that blanket, I'm the only dude or guy in the house”

The subsequent exchange followed:

“Q: ... You would just touch her and then touch yourself[?] I mean really that's the extent of this whole thing. Is that a fair summary of what happened? And if so, how did it start? I know nobody likes talking about it, man, but I'll tell you, the truth will set you free.... I know that it's eating you up. I'm just here to help you let it free if you want to.

“A: Just don't know what to do.

“Q: This is where it starts. This is just the beginning of this journey.

“A: I can’t do this again. Am I talking to you on the record or off the record or what? I don’t understand how it works. (Unintelligible).

“Q: *So what?* I document everything I do and I’m not—I’m not here to hide anything.

“A: Well, it’s—I was just asking if I was—(unintelligible) to say anything it was gonna get used against me.

“Q: I read you your rights and those were part of them.

“A: *Well, I just didn’t know if they were pertaining to [me] now since I know you’d like me to talk to you.*

“Q: We’re on the record. We’re always on the record. *If you want to waive those rights, I would love to sit down and talk with you and figure this out with you.*

“A: *I honestly—I—I don’t know what to do here. I—I don’t.* [¶] ... [¶] I just get so paranoid, man. I don’t know[.] [¶] ... [¶] I don’t kn...I really want to talk, I just don’t know what to say.

“Q: You really do want to talk, you just don’t know what to say? Can I ask small questions?

“A: I don’t care. [¶] ... [¶]

“Q: I mean, I’m just—I’m just hitting you with it. I mean these are the allegations against you. This is what you’re being arrested for. Did they happen?

“A: I don’t know. Apparently you feel like they did. [¶] ... [¶]

“Q: ... It’s—it’s up to you, man. If you wanna talk, I’m willing to talk. If you want a lawyer, then get a lawyer. And, you know, you’re not gonna hurt my feelings either way....

“A: I’d be more willing to talk to you if you could tell me what I’m looking at.” (Italics added.) [The ensuing brief discussions about punishment was redacted.]

Thereafter, McPherson talked at some length about abusing drugs and the significant gaps it had caused in his memory. Lowry said: “[This matter is] actually very simple. One thing happened. It just happened a—a bunch of times.... It just is what it is.” McPherson went on to say, repeatedly, that he did not remember putting his hand in [H.A.’s] underwear. He said: “I don’t remember doing anything like that to her. I don’t.” He added: “[We would] play fight.” “She’d kick me or whatever and I’d pinch her on the butt, stuff like that. But I don’t—I don’t remember never stickin’ my hand in her pants or doin’ something like that. I remember going in there and laying with her and hugging her and just, like, when—just like if (Jessica) was mad at me I’d go lay with my son or I’d go lay with her. I’d go lay with one or the other or my dog. I did—I’ve watched porn. I’ve watched a lot of porn and I was—I did....” Lowry asked: “Did you watch it with her?” McPherson replied: “No, never. Hell, no.” McPherson continued: “I’m tellin’ you. I’m sitting here thinkin’ I did not—I do not remember doin’ anything like that to her. I remember laying with her. I remember cuddling with her. I remember talking to her about movies. I remember doing all that stuff. I don’t remember ever touching, like, her inappropriately besides pinching her butt, if that’s inappropriate. I haven’t done anything else like that. I never.”

At another point, McPherson said: “I think—I mean I’m not tryin’ to get put on suicide watch, but I think I need to talk to a fuckin’ counselor or something. I don’t feel very....” Lowry told him: “I’ll tell you what. I’ll leave my card in your papers. If you still wanna talk, call me. If you wanna talk right now, I’m still willing to hang out. I’ll leave it up to you right now.” McPherson said: “I’m really torn about it. I think I’m gonna (unintelligible).” Lowry responded: “I told you I’m not playin’ any games. I’m straight up with you.” McPherson said: “I don’t remember ever doin’ that to her. I know I yelled at her. I was verbally abusive to the—all of ‘em from bein’ smokin’ all the time. I was constantly angry and ... [¶] ... [¶] ... I had zero patience.” He added: “Me and my brother were pretty much all the fuck we had. My mom was a coke head and my

dad was a truck driver. No idea how to fucking take care of a family. I fuckin' tried. I just wish there was a rewind button." Finally, he said: "My head's just fucked up right now. I really need to talk to like a psychiatrist or a doctor to like...." Lowry replied: "[Ok]ay. I'll leave you my card in your papers, man."

4. McPherson's Trial Testimony Regarding Jail Encounter with Lowry

At trial, McPherson testified: "Initially at the initial interview, I was pretty shocked. I'm not saying that he said it, but I took it as I was coming up there to either eliminate myself as a suspect or to help him find out what happened if something did happen. [¶] So when he initially started saying that stuff to me, like I said, I've been in trouble before, so I naturally just distrust police officers. I don't know what—I didn't know how to explain my point of view to him or even—I don't know how to explain it right now. It's like I didn't know if I could trust him to put across my side of the story. I didn't—there was stuff I wanted to say, but I didn't know if I should. I didn't know if it was something I could say without [him] just using it against [me]."

McPherson also explained that when he "initially" talked to Lowry, he "didn't really understand what was going on." Then, "by the time [Lowry] had arrested [him] and taken [him] over [to jail], [Lowry] came in [to the jail] and mentioned that he was filing the other charges," i.e., the child molestation charges. This was the first time that Lowry had said that he was charging McPherson in the case, specifically under sections 288.5 and 288, subdivision (a), so McPherson asked him what those statutes meant. Thereafter, Lowry questioned McPherson about semen found on a blanket and other investigative issues.

B. Analysis of *Miranda* Claim⁵

McPherson essentially argues that he “invoked his right to counsel,” at least after he was arrested and *Mirandized* at the sheriff’s investigations office, but Detective Lowry *subsequently* “improperly continued to interrogate him” at the county jail, rendering his statements at the jail inadmissible in the prosecution’s direct case. McPherson further argues that the custodial statements obtained at the jail and admitted at trial “became a pillar of the People’s case” and, in turn, were not “harmless beyond a reasonable doubt” under the *Chapman* standard of prejudice applicable to federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).)

In resolving McPherson’s claim, we first consider whether McPherson in fact invoked his *Miranda* rights, specifically his right to the presence of counsel during custodial interrogation, at the sheriff’s investigations office. Applying *Davis*, we conclude that McPherson did invoke his right to counsel upon being arrested and *Mirandized* at the sheriff’s investigations office. (*Davis, supra*, 512 U.S. at pp. 459, 461 [in order to invoke right to counsel, suspect must clearly and “unambiguously” request counsel].)

We next consider whether, in light of McPherson’s invocation of the *Miranda* right to counsel, Lowry’s subsequent reinterrogation of McPherson at the jail was proper. Applying *Edwards*, we conclude it was not. (*Edwards, supra*, 451 U.S. at p. 485 [impermissible for authorities “to reinterrogate an accused in custody if he has clearly asserted his right to counsel”].) In turn, we conclude the trial court erred in admitting, in the prosecution’s direct case, the statements made by McPherson at the jail.

Finally, we conclude admission of these statements was prejudicial, thereby requiring reversal of the judgment of conviction.⁶

⁵ We apply federal standards in reviewing *Miranda* claims. (*People v. Sims* (1993) 5 Cal.4th 405, 440 (*Sims*), overruled on another ground by *People v. Storm* (2002) 28 Cal.4th 1007, 1031–1033.)

1. McPherson Clearly Invoked the *Miranda* Right to Counsel

Our Supreme Court has explained: “The prophylactic requirements of *Miranda*, *supra*, are familiar. In order to assure protection of the Fifth Amendment right against self-incrimination against ‘inherently coercive’ circumstances, a suspect may not be subjected to an interrogation in official ‘custody’ unless he has previously been advised of, and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel, if he is indigent. Even if the suspect initially waives these rights and responds to interrogation, he may reinvoke them at any time. If he does so ‘in any manner and at any stage of the process,’ his request to terminate the questioning or obtain counsel must be ‘scrupulously honored.’” (*People v. Boyer* (1989) 48 Cal.3d 247, 271 (*Boyer*);⁷ see *Miranda*, *supra*, 384 U.S. at p. 444 [“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”].)

As the above excerpted passage from *Boyer* makes clear, *Miranda* applies to questioning under the coercive conditions of official “‘custody.’” (*Boyer*, *supra*, 48 Cal.3d at p. 271; see *Miranda*, *supra*, 384 U.S. at p. 444.) “[C]ustody” means “a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” (*California v. Beheler* (1983) 463 U.S. 1121, 1125, quoting *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; accord, *Green v. Superior Court* (1985) 40 Cal.3d 126, 135.) Once *Miranda* warnings have been given to a suspect in custody, if the

⁶ To the extent McPherson challenges the admissibility of any part of his interrogation at the sheriff’s investigations office itself, that claim is moot in light of our conclusion that McPherson’s statements at the jail were both inadmissible and prejudicial.

⁷ *Boyer* was overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.

suspect invokes his rights, “all questioning must cease.” (*Smith v. Illinois* (1984) 469 U.S. 91, 98.)

We note, as a preliminary matter, that McPherson was in custody throughout the period relevant to our analysis. Detective Lowry testified, at the Evidence Code section 402 hearing on the admissibility of the statements he obtained from McPherson, that in the course of questioning McPherson at the sheriff’s investigations office, he arrested McPherson on a misdemeanor warrant from animal control and “contemporaneously” gave him *Miranda* warnings. McPherson argues he invoked his *Miranda* right to counsel thereafter.⁸ McPherson was then transported to jail in a patrol car and placed in a holding cell, where Lowry again interrogated him.

We now turn to consider whether, after he was arrested and *Mirandized*, McPherson invoked the right to counsel. In *Davis*, the United States Supreme Court clarified the standards governing the invocation of the right to counsel under *Miranda*. *Davis* observed that “[i]nvocation of the *Miranda* right to counsel ‘requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney’” in dealing with custodial interrogation by the police. (*Davis, supra*, 512 U.S. at p. 459, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 (*McNeil*); *Moran v. Burbine* (1986) 475 U.S. 412, 433, fn. 4 [““‘[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney.’”].) Under *Davis*, it is incumbent upon the suspect to “unambiguously” request counsel. (*Davis, supra*, at pp. 459, 461 [“law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney”].) Furthermore, “[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.” (*Id.* at pp. 458–459.)

⁸ Although McPherson also suggests he invoked his right to counsel at an earlier point in the interrogation as well, for purposes of our analysis we focus on his argument that he invoked his right to counsel after he was arrested and *Mirandized*.

Thus, “[a]lthough a suspect need not ‘speak with the discrimination of an Oxford don,’ [citation], he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” (*Id.* at p. 459.)

“*Davis* now provides the standard by which we assess whether a defendant’s reference to counsel constituted an unambiguous and unequivocal invocation of the right to counsel.” (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 (*Gonzalez*); see *People v. Tully* (2012) 54 Cal.4th 952, 990–991 [whether the suspect has invoked the right to counsel is a question of fact to be decided in light of all the circumstances, from the point of view of a reasonable officer].) In reviewing the issue, we must “‘accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.’” (*Gonzalez, supra*, at p. 1125, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 992.) Here, McPherson’s references to counsel at the sheriff’s investigations office are captured on the video recording (and corresponding transcript) of the encounter. (See *People v. Jennings* (1988) 46 Cal.3d 963, 979 [we must independently review the videotaped interrogation and make an independent determination of the question whether the suspect invoked his *Miranda* rights]; *Gonzalez, supra*, at p. 1125.)

Here, McPherson clearly invoked the right to counsel guaranteed by *Miranda*. The People argue that McPherson’s initial, prearrest reference to an attorney—“I think I want to talk to a lawyer ’cause it sounds like you are already accusing me of doing something”—was an ambiguous and, hence, ineffective assertion of his *Miranda* right to counsel. (See *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070, 1072, overruled on other grounds by *Lockyer v. Andrade* (2003) 538 U.S. 63, 71 [the phrase, “‘I think I would like to talk to a lawyer’” was ambiguous]; but see *Cannady v. Dugger* (11th Cir. 1991) 931 F.2d 752, 755 [finding no ambiguity when a suspect said, “‘I think I should call my lawyer’”].) However, regardless of whether this initial reference amounted to an

invocation of the *Miranda* right to counsel, McPherson's subsequent requests for an attorney following his arrest at the sheriff's investigations office, constituted a clear and unambiguous invocation of this right.

After he was arrested and *Mirandized*, McPherson plainly said he wanted to consult a lawyer before talking further with Lowry: "I would at least like to talk to [a lawyer] first, yes." There is nothing ambiguous about this statement. (See *Smith v. Illinois*, *supra*, 469 U.S. at pp. 97–98 [“[a] statement either is [a clear] assertion [of the right to counsel] or it is not”]; *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [requests for counsel are to be “understood as ordinary people would understand them”]; *Sessoms v. Grounds* (2015) 776 F.3d 615, 617 (*Sessoms*) [“When a suspect says ‘give me a lawyer,’ that request walks, swims, and quacks like a duck. It is an unambiguous request for a lawyer, no matter how you slice it.”].) McPherson's postarrest references to counsel were not qualified by any hallmarks of equivocation. (See *Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 865 [words such as “‘maybe’” or “‘might’” can render statements ambiguous; see also *Davis*, *supra*, 512 U.S. at p. 462 [the phrase, “‘[m]aybe I should talk to a lawyer’” was ambiguous].) Additionally, the circumstances of the interrogation at the sheriff's investigations office do not suggest that McPherson did not mean what he said. In fact, when Lowry next asked McPherson whether he would be willing to talk to Lowry *in the presence of counsel*, McPherson reiterated: “I wanna talk to a lawyer and see.” At that point, Lowry stopped questioning McPherson for the moment—evidently because he concluded that McPherson had invoked his right to counsel under *Miranda*—and terminated the interrogation.⁹

Our conclusion is supported by an examination of cases finding *unequivocal* requests for counsel. (See, e.g., *Robinson v. Borg* (9th Cir. 1990) 918 F.2d 1387, 1391

⁹ Lowry then turned to arranging for a patrol car to transport McPherson to jail, maintaining his in-custody status (McPherson had previously been handcuffed and remained so for the journey).

["I have to get me a good lawyer man. Can I make a phone call?"]; *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1529 ["Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?"]; *United States v. Lee* (7th Cir. 2005) 413 F.3d 622, 626 ["Can I have a lawyer?"].) Just like the above statements, McPherson's reference to counsel clearly reflected a present desire to consult with counsel for purposes of the interrogation. (See *Gonzalez, supra*, 34 Cal.4th at p. 1126 [right to counsel invoked upon an unequivocal request for the immediate presence of an attorney].)

The People do not reference McPherson's postarrest requests for counsel or address their import, focusing only on his initial request, "I think I want to talk to a lawyer, 'cause it sounds like you are already accusing me of doing something." Indeed, the People inexplicably claim, "[T]here is nothing in the record to indicate that [McPherson] ever invoked his *Miranda* rights after he was placed under arrest." We cannot agree with this characterization of the record.

We conclude the trial court's determination that McPherson did not invoke his *Miranda* right to counsel at the sheriff's investigations office is erroneous and not substantially supported by the record.¹⁰

¹⁰ *People v. Jennings, supra*, 46 Cal.3d at page 979 and *Gonzalez, supra*, 34 Cal.4th at page 1125 suggest we review this question independently. However, *People v. Crittenden* (1994) 9 Cal.4th 83 at pages 128 and 131, and *People v. Cunningham* (2001) 25 Cal.4th 926 at pages 992 and 994 reference both the independent and substantial evidence standards of review in this context. *People v. Waidla* (2000) 22 Cal.4th 690 (*Waidla*) comprehensively discussed the issue of standards of review applicable to *Miranda* inquiries. *Waidla* observed: "An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of mixed question of law and fact that is predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual." (*Waidla, supra*, at p. 730.) It appears, under *Waidla's* framework, that the issue of invocation of *Miranda* rights, a predominantly factual inquiry, would be reviewed

2. McPherson’s Subsequent Jail Statements were Inadmissible Under Prophylactic Safeguards for Right to Counsel Announced in *Edwards*

a. *The Edwards Framework*

In *Miranda*, the United States Supreme Court stressed that “the modern practice of in-custody interrogation is psychologically rather than physically oriented” (*Miranda*, *supra*, 384 U.S. at p. 448), whereby “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals” (*id.* at p. 455). As stated above, *Miranda* therefore established certain prophylactic safeguards that must be afforded to suspects, including the rights to remain silent and to have counsel present during a custodial interrogation. (*Id.* at p. 444.) “*Miranda* did not hold, however, that those rights could not be waived. On the contrary, the opinion recognized that statements elicited during custodial interrogation would be admissible if the prosecution could establish that the suspect ‘knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.’” (*McNeil*, *supra*, 501 U.S. at p. 176; see *Duckworth v. Eagan* (1989) 492 U.S. 195, 202 [“The Court in *Miranda* ‘presumed that interrogation in certain custodial circumstances is inherently coercive and ... that statements made under those circumstances are inadmissible *unless* the suspect is specifically warned of his *Miranda* rights and freely decides to forgo those rights.’” (Italics added.)].)

Fifteen years later, in *Edwards*, the federal high court refined its analysis of the *Miranda* right to counsel. *Edwards* “established a *second layer of prophylaxis* for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current interrogation cease, *but he may not be approached for further interrogation* ‘until counsel has been made available to him,’” which, in turn, means “counsel must be present.”

for substantial evidence. However, here the relevant interrogation was recorded on video that can be independently reviewed. In any event, we need not dwell further on the question of the applicable standard of review because, irrespective of which standard we apply—*de novo* or substantial evidence—we conclude the trial court erred.

(*McNeil, supra*, 501 U.S. at pp. 176–177, italics added.) Stated differently, *Edwards* held that “an accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” (*Edwards, supra*, 451 U.S. at pp. 484–485.)

More specifically, under *Edwards*’s “rigid” corollary to *Miranda* (*Fare v. Michael C.* (1979) 442 U.S. 707, 719), “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights” (*Edwards, supra*, 451 U.S. at p. 484). On the contrary, once a suspect has invoked the right to counsel, “[i]f the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect’s statements are *presumed involuntary* and therefore inadmissible as substantive evidence at trial, *even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.*” (*McNeil, supra*, 501 U.S. at p. 177, italics added.) If, on the other hand, the suspect initiates the subsequent encounter, any ensuing interrogation statements are admissible only if he knowingly and intelligently waives his prior invocation of counsel. (*Edwards, supra*, at p. 486, fn. 9.)

Of particular relevance in the instant matter, “the *Edwards* rule is ‘designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights,’ [(*Michigan v. Harvey* [(1990)] 494 U.S. 344, 350[]), and to ensure that officers ‘will not take advantage of the mounting coercive pressures of prolonged police custody,’ [(*Maryland v. Shatzer* [(2010)] 559 U.S. 98, 105[]); [citation].” (*Sessoms, supra*, 776 F.3d at p. 622.) Ultimately, “[t]he purpose of the *Miranda-Edwards* guarantee’ is to protect ‘the suspect’s desire to deal with the police only through counsel.’” (*Ibid.*; see

Davis, supra, 512 U.S. at p. 460 [“The rationale underlying *Edwards* is that the police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation.”].) The *Edwards* rule, moreover, is not offense-specific: once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present. (*Arizona v. Roberson* (1988) 486 U.S. 675, 678, fn. 2 (*Roberson*).)

Davis clarified that the *Edwards* rule applies when the suspect unambiguously and unequivocally invokes the *Miranda* right to counsel, which, as we concluded above, occurred here. (*Davis, supra*, 512 U.S. at p. 459; *McNeil, supra*, 501 U.S. at p. 178.) Once “the accused [has] invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.” (*Smith v. Illinois, supra*, 469 U.S. at p. 95; see *Edwards, supra*, 451 U.S. at p. 486, fn. 9; see also *Sims, supra*, 5 Cal.4th at p. 440 [where, after invoking right to counsel, a suspect initiates encounter with police and “reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation”]; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1311.)

b. Application of the Edwards Rule Here

As discussed above, McPherson unambiguously invoked his *Miranda* right to counsel upon his arrest at the sheriff’s investigations office, thereby indicating that he believed he was “*not capable of undergoing [further] questioning without advice of counsel.*” (*Roberson, supra*, 486 U.S. at p. 681, italics added.) Lowry ceased interrogating McPherson at that point and arranged for him to be transported to jail. However, Lowry followed McPherson to the jail, where the latter remained in custody, confined in a holding cell. The two had a second encounter at the jail, during which Lowry obtained further interrogation statements from McPherson, without first making

counsel available to him. To the extent Lowry initiated the encounter at the jail, McPherson's statements were involuntary, and in turn inadmissible, under *Edwards*. (*Edwards, supra*, 451 U.S. at p. 485.)

“The finding of ‘initiation’ in and of itself is ‘reviewed for substantial evidence’ as the resolution of a ‘mixed question’ of law and fact that is ‘predominantly factual.’” (*Waidla, supra*, 22 Cal.4th at p. 731, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 649.) “The finding of any underlying historical fact is [also] reviewed for substantial evidence as the resolution of a pure question of fact.” (*Waidla, supra*, at p. 731.) However, since here the underlying encounter was recorded, we will apply independent review. (See *Sims, supra*, 5 Cal.4th at pp. 440–441.)

Here, Lowry recorded both of his interactions with McPherson, that is at the sheriff's investigations office and the jail, respectively. At the end of the encounter at the sheriff's investigations office, McPherson was very concerned that the police update his girlfriend (who was his ride and was waiting for him in the car) on his situation, give his personal effects to her, and provide her with directions to the jail so she could meet him there (Lowry described the misdemeanor warrant on which McPherson was arrested as a “book and release” warrant, so McPherson was evidently expecting to be released after booking). Lowry told McPherson he would inform Krystle of the situation and give her directions to the jail. As McPherson was being escorted to jail, the deputy transporting him assured him that Lowry had gone outside to talk to Krystle.

The record reflects that when McPherson thereafter saw Lowry at the jail, McPherson beckoned him over to the holding cell in which McPherson was confined. Lowry testified that he activated his audio recording device as he walked over to talk to McPherson. McPherson's first words upon Lowry's approach—“I'm just, uh, (unintelligible) you were able to talk to ([Krystle]) and what happened[?]”—indicate McPherson simply sought to confirm that Lowry had apprised Krystle of the fact that he had been arrested on the book-and-release misdemeanor warrant and to find out whether

she was going to meet him at the jail. Lowry answered, “Yeah, I was,” but instantly redirected the conversation away from Krystle to tell McPherson, for the first time, that he was going to arrest and book McPherson on child molestation charges rather than only on the animal control misdemeanor warrant. In explaining the charges, Lowry further added, “It’s just kind of the flat statute, you know. It’s just elements. What it basically means is that I believe that I have enough evidence in the case that, you know, these things happen[ed].” Lowry emphasized that he had specifically come to the jail to talk to McPherson in person about his decision to arrest McPherson on child molestation charges on the basis of evidence generated by the investigation.

Thereafter, Lowry directly segued into asking McPherson for information related to the investigation: “I know I read you your *Miranda* rights earlier, but at the same time if you still, you know, want to make—help me make sense of all this, I’m still willing to listen, but I just need you to remember that. Shit happens, man. Life happens. This ain’t the end of it all.” In response, McPherson blurted out, “If I did that, I don’t remember doing it.” Further interrogation followed, during which Lowry obtained additional incriminating statements from McPherson.

In *Oregon v. Bradshaw*, the federal high court explained that, after invoking the right to counsel, an accused “initiates further communication, exchanges, or conversations with the police” (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 (plur. opn. of Rehnquist, J.) (*Bradshaw*)) for purposes of the *Edwards* inquiry, when he speaks words or engages in conduct that can be “fairly said to represent a desire on [his] part to open up a more generalized discussion relating directly or indirectly to the investigation” (*Bradshaw, supra*, at p. 1045; accord, *People v. Mickey, supra*, 54 Cal.3d at p. 648.) In the event the accused does in fact initiate such dialogue, the police may commence interrogation if he validly waives his rights. (*Bradshaw, supra*, at p. 1046 (plur. opn. of Rehnquist, J.)) *Bradshaw* cautioned, however, that “there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to

‘initiate’ any conversation or dialogue.” (*Id.* at p. 1045.) Indeed, “inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally ‘initiate’ a conversation in the sense in which that word was used in *Edwards*.” (*Ibid.*)

Here, the record reveals that McPherson beckoned Lowry over to ask him whether he had been able to apprise Krystle of his situation. We conclude that McPherson’s question in this regard was “merely a necessary inquiry arising out of the incidents of the custodial relationship,” in that McPherson wanted to confirm that Krystle had been made aware of the situation and to ascertain her response. (*Bradshaw, supra*, 462 U.S. at p. 1046 (plur. opn. of Rehnquist, J.)) In short, his limited inquiry did not reflect, on his part, “a willingness and a desire for a generalized discussion about the investigation.” (*Id.* at pp. 1045–1046; see *Sims, supra*, 5 Cal.4th at p. 442.)

In *Sims*, our Supreme Court considered whether the defendant’s statements initiated a conversation with the police for purposes of the *Edwards* inquiry. (*Sims, supra*, 5 Cal.4th at p. 441.) *Sims* held: “By his offhand question as to ‘what was going to happen from this point on’ (coupled with a reference to extradition), which he posed to the police officers as they prepared to leave, [the] defendant did not open the door to interrogation after previously having invoked his *Miranda* rights.” (*Ibid.*) *Sims* explained that such limited comments were “‘natural, if not inevitable,’” given the situation the defendant was in. (*Id.* at p. 443.) *Sims* further explained the comments “did not ‘initiate’ further conversation,” but rather “related simply to ‘routine incidents of the custodial relationship’ which, as *Bradshaw* recognizes, ‘will not generally “initiate” a conversation’ [citation], much less justify interrogation (or its ‘functional equivalent’).” (*Id.* at p. 442.) *Sims* concluded the defendant there “did not refer to the crimes or indicate a desire or willingness to engage in a general discussion relating to the investigation.” (*Ibid.*)

Similarly, in *In re Z.A.* (2012) 207 Cal.App.4th 1401 (Z.A.), the court considered whether a statement made by the minor after she invoked her *Miranda* rights, constituted “initiation” of a conversation with the authorities. Z.A. and her boyfriend were arrested at the port of entry at San Ysidro after law enforcement found a large quantity of marijuana in their car. (Z.A., *supra*, at pp. 1405–1406.) Z.A. was arrested and interrogated, but invoked her *Miranda* rights. (Z.A., *supra*, at pp. 1406, 1410, 1412.) Subsequently, she asked the law enforcement agent, “[W]ell I want to know if [my boyfriend] is going to stay here how much time[?]”¹¹ (Z.A., *supra*, at pp. 1410, 1418.) The Z.A. court held that this statement “cannot reasonably be deemed an invitation to reinitiate a ‘generalized discussion relating directly or indirectly to the investigation’” (Z.A., *supra*, at p. 1418.) “Rather than expressing a desire to resume the interrogation, Z.A.’s statement is more reasonably interpreted as expressing her interest in knowing whether, and for how long, her boyfriend was to remain detained at the border crossing.” (*Id.* at p. 1420.) As such, “Z.A.’s question concerned the ‘routine incidents of the custodial relationship, [that] will not generally “initiate” a conversation in the sense in which that word was used in *Edwards*.’” (*Id.* at p. 1418.) McPherson’s question about Krystle was even less of a reinitiation under *Edwards* and *Bradshaw* than were the questions at issue in *Sims* and Z.A., as Krystle had nothing to do whatsoever with the investigation into H.A.’s accusations.¹²

As for Lowry, he was well aware that McPherson had invoked his right to counsel (Lowry ceased interrogating McPherson at the sheriff’s office after the invocation).

¹¹ In response, the agent told her that her boyfriend was not ““going to go away for a long time”” for smuggling marijuana. (Z.A., *supra*, 207 Cal.App.4th at p. 1410.)

¹² The statements at issue in *Sims* and Z.A. were made very close in time to the invocation of rights by the respective interrogee in those cases, while the present record is silent as to the time gap between McPherson’s invocation of his right to counsel and the subsequent encounter with Lowry at the jail. In any event, the analyses undertaken by *Sims* and Z.A. are highly relevant here.

Nonetheless, he came to the jail, by his own admission, to discuss the case with McPherson. Consistent with this stated intention, rather than properly answering McPherson's specific inquiry about Krystle, Lowry told McPherson he had reviewed the case again and decided there was "enough evidence" to arrest McPherson for, and charge him with, specific child molestation offenses.¹³

Our Supreme Court has clarified: "The *Edwards* rule renders a statement invalid if the authorities initiate *any* 'communication, exchanges, or conversations' relating to the case, other than those routinely necessary for custodial purposes." (*Boyer, supra*, 48 Cal.3d at p. 274.) Even if Lowry's preliminary statements about his plans to arrest McPherson on child molestation charges and his possession of evidence supporting those charges is construed as "necessary for custodial purposes" (*ibid.*), here Lowry went on to ask McPherson to "help" him "make sense" of the allegations because "[s]hit happens." Lowry's invitation to McPherson to address the substance of the investigation constituted prohibited reinitiation and reinterrogation and triggered *Edwards*'s prophylactic protections, thereby rendering McPherson's subsequent statements inadmissible in the prosecution's direct case.

"[F]orbidden renewed 'interrogation' includes both direct questioning and its 'functional equivalent.' 'That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely [when viewed from the suspect's perspective] to elicit an incriminating response from the suspect....'" (*Boyer, supra*, 48 Cal.3d at p. 273, quoting

¹³ Later, after Lowry had resumed interrogating McPherson, the latter again asked about Krystle. At that point, Lowry said: "I told her that, you know, it wasn't just a book and release, um, warrant anymore, that I was actually gonna be arresting you for the charges in my case. I didn't tell her what the charges were. I just told her that, you know, what I do."

Rhode Island v. Innis (1980) 446 U.S. 291, 301 (*Innis*); accord, *Sims*, *supra*, 5 Cal.4th at p. 440 [same].)¹⁴

When Lowry suggested McPherson should “help [him] make sense of” H.A.’s allegations, McPherson was in a holding cell in jail (unable to communicate with Krystle), he had just been told that he was going to be booked on felony charges not just a misdemeanor book-and-release warrant, and he had already asked for the presence of counsel to no avail. The pressures to confess, or at least “to appear innocently cooperative,” were thus very strong. (*Boyer*, *supra*, 48 Cal.3d at p. 274; see *Martinez v. Cate* (2018) 903 F.3d 982, 995 [“[T]he *Innis* test explicitly calls for considering the ‘perceptions of the suspect, rather than the intent of the police.’ [Citation.] ... Further, how a suspect reacts to a statement can provide evidence of how the suspect perceived the statement.”].) Indeed, Lowry’s actions appear to be calculated to, first, rattle McPherson (who was in a jail holding cell) by telling him he was now facing arrest on felony child molestation charges and Lowry had evidence to prove the charges, and, next, taking advantage of McPherson’s distress at the sudden change of circumstances, encourage him to talk to Lowry about the case. (See *Boyer*, *supra*, at pp. 274–275.)

Again, *Sims* is instructive. In *Sims*, after invoking his *Miranda* rights, the defendant asked the officer, “‘what was going to happen from this point on,’” coupled with a reference to extradition. (*Sims*, *supra*, 5 Cal.4th at p. 441.) In response, the officer alluded to evidence the police had obtained regarding the defendant’s role in the homicide under investigation, whereupon the defendant confessed to the killing. (*Id.* at pp. 437–438.) *Sims* noted: “In reply to [the] defendant’s inquiry, [the officer] pursued a

¹⁴ *Innis* clarified: “By ‘incriminating response’ we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial. As the Court observed in *Miranda*, [¶] ‘... [s]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word.’” (*Innis*, *supra*, 446 U.S. at p. 301, fn. 5.)

line of conversation far exceeding the scope of any answer legitimately responsive to [the defendant's limited] question concerning extradition.” (*Id.* at p. 442.) *Sims* concluded the officer's response “focusing upon the investigation” was “nonresponsive” to the defendant's inquiry and “served no legitimate purpose incident to [the] defendant's arrest or custody”; rather it was an improper ““technique of persuasion”” and, in turn, the functional equivalent of prohibited interrogation. (*Id.* at pp. 443, 444.)

Here, Lowry similarly engaged in prohibited interrogation that was not justified by McPherson's limited inquiry about Krystle. (See *Innis, supra*, 446 U.S. at p. 301.) Furthermore, this interrogation was police-initiated as McPherson's limited inquiry about whether Lowry had managed to talk to Krystle cannot be said to have invited it. As in *Sims*, “[t]he present case illustrates the ease with which the bar imposed by the suspect's invocation of rights could be dissipated if that invocation is not scrupulously honored.” (*Sims, supra*, 5 Cal.4th at p. 444; see *Z.A., supra*, 207 Cal.App.4th at p. 1421 [*Z.A.*, who was arrested at port of entry with her boyfriend, invoked rights but then asked about her boyfriend; the court reversed because the agent, *rather than providing a responsive answer*, “used the opportunity to direct a barrage of additional statements to [her] that were the functional equivalent of interrogation”].)

Upon Lowry's overture to McPherson to “help [him] make sense of all this,” McPherson's “will buckled” (*Boyer, supra*, 48 Cal.3d at p. 274), and he made an incriminating statement: “If I did [the inappropriate touching], I don't remember doing it.” Lowry then stated, “If you want to give me a moment, I'll share with you a little bit more of the evidence that I have.” The interrogation continued as Lowry proceeded to confront McPherson with specific evidence, such as the semen deposits on the comforter. Deploying express questioning, Lowry obtained additional incriminating statements from McPherson. At trial, the prosecutor used these statements to great effect in both cross-examining McPherson and in her closing arguments.

On the basis of our independent review of the recorded and transcribed encounters between Lowry and McPherson, we conclude that McPherson’s jail statements were the result of Lowry’s improper resumption of case-related communication and questioning at the jail. (See *Sims, supra*, 5 Cal.4th at pp. 440–441.) Contrary to the trial court’s finding that McPherson “volunteered” the incriminating statements he made at the jail, those statements were the product of police-initiated interrogation following McPherson’s invocation of his *Miranda* rights.¹⁵ (See *Boyer, supra*, 48 Cal.3d at p. 273 [“Once the *Miranda* right to counsel has been invoked, no valid waiver of the right to silence and counsel may be found absent the ‘*necessary fact* that the accused, not the police, reopened the dialogue with the authorities.’”].) Accordingly, McPherson’s jail statements were improperly admitted at trial.

Even assuming, for purposes of argument, that McPherson reinitiated a conversation with Lowry (at the jail) within the meaning of *Edwards* and *Bradshaw*, we cannot say after independent review, that the People have met their burden to show that McPherson subsequently made a knowing and intelligent waiver, under the totality of the circumstances, of the right to counsel he had previously invoked. (*Bradshaw, supra*, 462 U.S. at pp. 1044–1045 (plur. opn. of Rehnquist, J.); *People v. Bradford* (1997) 14 Cal.4th 1005, 1035 (*Bradford*) [where the defendant had invoked his right to counsel but, subsequently, himself reinitiated discussion about the investigation, the prosecution was nonetheless further required to demonstrate, by a preponderance of the evidence, that he made a knowing and intelligent waiver of this right].)

Following reinitiation by a defendant, any subsequent waiver “must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (*Moran v. Burbine, supra*, 475 U.S. at

¹⁵ Even if the substantial evidence standard of review applies, the trial court’s conclusion that McPherson’s statements at the jail were “volunteered” is not supported by substantial evidence.

p. 421.) “Only if the ‘totality of the circumstances surrounding the interrogation’ reveals ... the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*Ibid.*) “Once it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.” (*Id.* at pp. 422–423, fn. omitted.)

We see no evidence that at the time Lowry interrogated McPherson at the jail, McPherson possessed “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (*Moran v. Burbine*, *supra*, 475 U.S. at p. 421.) First, Lowry did not re-*Mirandize* McPherson or remind him of his prior unequivocal invocation of the right to counsel; he simply made a passing reference to the effect, “I know I read you your *Miranda* rights earlier,” only to undercut it by adding, “but at the same time if you still, you know, want to make—help me make sense of all this, I’m still willing to listen, but I just need you to remember that.” (Cf. *Bradshaw*, *supra*, 462 U.S. at p. 1046 (plur. opn. of Rehnquist, J.) [The officer “immediately reminded the accused that ‘[you] do not have to talk to me,’ and only after the accused told him that he ‘understood’ did they have a generalized conversation”]; *Sims*, *supra*, 5 Cal.4th at p. 446 [prior to commencement of second interrogation, which the defendant initiated, the defendant received and *expressly* waived *Miranda* rights]; *Z.A.*, *supra*, 207 Cal.App.4th at pp. 1419–1420.) While it is not clear that renewed *Miranda* warnings are always required to find a knowing and intelligent waiver of the right to counsel, their absence here weakens a claim that McPherson made such a waiver. (See *Bradford*, *supra*, 14 Cal.4th at p. 1036.)

Furthermore, McPherson made statements indicating he was unsure of how the process works, evidently because he was confused by the fact that, despite having invoked his *Miranda* rights, he was still being pressed to talk. He asked Lowry, “Am I

talking to you on the record or off the record or what? I don't really understand how it works." Lowry answered: "*So what?* I document everything I do and I'm not—I'm not here to hide anything." (Italics added.) McPherson, again, tried to get clarification of his rights: "Well, it's—I was just asking if I was ... to say anything it was gonna get used against me." Lowry answered: "I read you your rights and those were part of them." McPherson, understandably confused under the circumstances, replied: "*Well, I just didn't know if they were pertaining to [me] now since I know you'd like me to talk to you.*" (Italics added.) Lowry responded: "We're on the record. We're always on the record. If you want to waive those rights, I would love to sit down and talk with you and figure this out with you." McPherson said: "I honestly—I—I don't know what to do here. I—I don't."

At other points, when Lowry asked whether McPherson wanted to talk to him, McPherson responded, "I don't care, yeah" and "I don't kn ... I really want to talk, I just don't know what to say." His latter statement indicates that he was unsure of what to say in the absence of advice from the counsel he had requested. Nonetheless, Lowry responded, "You really do want to talk, you just don't know what to say? Can I ask small questions?" McPherson responded, "I don't care."

On this record, even were we to assume that McPherson initiated the conversation leading to reinterrogation at the jail, we cannot say that McPherson abandoned his *Miranda* rights with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Moran v. Burbine, supra*, 475 U.S. at p. 421.) We conclude the People failed to establish by a preponderance of the evidence that McPherson knowingly and intelligently waived these rights. (See *Bradford, supra*, 14 Cal.4th at p. 1037.) Indeed, the People's brief simply asserts McPherson did so, without any substantive discussion of the point.

In sum, McPherson's statements at the jail were obtained in violation of *Miranda* and its progeny and were inadmissible in the prosecution's direct case. (*Boyer, supra*, 48

Cal.3d at p. 271; see *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602 [holding that the defendant's statements "should not have been admitted into evidence," and noting that "[w]ere we to reach a contrary determination," the police could "successfully ignore the pronouncements of the United States and California Supreme Courts"].)

3. Admission of McPherson's Jail Statements was Prejudicial

The erroneous admission of statements obtained in violation of *Miranda* is reviewed for prejudice under the *Chapman* standard of prejudice. (*Chapman*, *supra*, 386 U.S. 18; see *Arizona v. Fulminante* (1991) 499 U.S. 279, 309–310; *Sims*, *supra*, 5 Cal.4th at p. 447; *Z.A.*, *supra*, 207 Cal.App.4th at p. 1422; see also *Gonzalez*, *supra*, 34 Cal.4th at p. 1122 ["As the [United States] Supreme Court [eventually] made clear in *Dickerson v. United States* (2000) 530 U.S. 428[, 437–441], *Miranda* is a rule of constitutional magnitude."].) Under *Chapman*, reversal is required unless the People establish that the court's error was "harmless beyond a reasonable doubt." (*Chapman*, *supra*, at p. 24.) Stated differently, pursuant to *Chapman*, the People must show beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Ibid.* ["the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"].)

Sullivan v. Louisiana (1993) 508 U.S. 275 (*Sullivan*) clarified how a reviewing court must apply the *Chapman* test, highlighting the difference between *Chapman*'s harmless error inquiry and one undertaken merely to assess the sufficiency of the evidence to support a conviction. *Sullivan* explained: "Harmless-error review looks, we have said, to the basis on which 'the jury *actually* rested its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan*, *supra*, at p. 279; accord, *People v. Neal* (2003) 31 Cal.4th 63, 86 (*Neal*) [for purposes of *Chapman* test, "the focus is what the jury actually decided and whether the error might have tainted its decision"];

People v. Quartermain (1997) 16 Cal.4th 600, 621 (*Quartermain*) [same].) In short, under *Chapman*, the question “is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.” (*Sullivan, supra*, at p. 279; *id.* at p. 280 [“more than appellate speculation about a hypothetical jury’s action” is required].)

It follows that, under *Chapman*, reversal is required if there is a “reasonable possibility that the evidence complained of might have contributed to the conviction.” (*Chapman, supra*, 386 U.S. at p. 23; see *Neal, supra*, 31 Cal.4th at p. 86 [“error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless”]; see also *Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [“To say that an error did not contribute to the [ensuing] verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.”].)

Here, a significant portion of the People’s case centered on the erroneously admitted interrogation statement that Lowry obtained from McPherson at the jail. First, the recording of virtually the entire jail interrogation was played for the jury. Lowry also addressed McPherson’s jail statements in his testimony, explaining why he found them inculpatory. Next, the prosecutor exhaustively cross-examined McPherson with reference to damaging and incriminating statements he had made during the jail interrogation, highlighting the contradictions between his trial testimony (in which he denied molesting H.A.) and his jail statements, and thereby eviscerating his credibility as well as his defense. Finally, the prosecutor again spotlighted McPherson’s damaging and incriminating jail statements, as well the contradictions between the latter and his trial testimony, in her closing argument. Below we address, in more detail, Lowry’s

testimony about these statements, as well as the prosecutor's use of these statements in cross-examination as well as in closing argument.¹⁶

After the recordings of McPherson's interrogations were played for the jury, Lowry evaluated the import of the statements McPherson had made therein. Lowry found it significant that McPherson initially articulated "general denials" such as "I didn't do it," but then transitioned to saying, "I don't remember doing it" and, eventually, went one step further to say, "If it did happen, I don't remember doing it." Lowry added: "I asked him if he ever watched porn with [H.A.] and his response was very clear, quick and unequivocal which was: No, never. Hell, no, which is, in that particular scenario, a response that I would anticipate receiving on the other allegations as well [but which was] absent [as to those] allegations." Lowry iterated that McPherson's robust denial of the porn allegation led Lowry "to believe [McPherson] was capable of ... voicing [a categorical denial]." Lowry continued: "However, during the course of my entire interviews, both of them with him, the lack of that denial that I knew he was ... capable of didn't present itself in the other allegations is the best way to put it."

Next, when McPherson took the witness stand, the prosecutor extensively cross-examined him with reference to his statements to Lowry, in particular the statements he gave while in custody at the jail. At one point, the prosecutor and McPherson had the following exchange:

"Q. ... [¶] That's your testimony here to the jury; that when [defense counsel] went through every allegation against you, you said, no, I never did that; no, I never sexually touched [H.A.].

"Why didn't you do that in the interview with the detective when being confronted with these allegations? [¶]...[¶]

¹⁶ McPherson did not make any incriminating statements in his initial interrogation at the sheriff's investigations office, where he invoked his right to counsel. Rather, the damaging statements highlighted by both Lowry and the prosecutor were obtained during Lowry's interrogation of McPherson at the jail.

“[A.] Can you repeat the question[?]”

“Q. Sure. Multiple times through the interview, you’re confronted with the allegations to tell whether or not they are accurate or not. Did it happen more than 5 times; did it happen less than 5 times[?] Multiple questions about what happened and you don’t answer.

“A. No, I didn’t answer [directly].

“Q. Yet when [defense counsel] here today goes through each and every one of the allegations as he did on direct with you, your answer to this jury is no, that never happened; no, that never happened; no, I never touched [H.A.] in an inappropriate way to every single allegation, correct?

“A. Yes.”

The prosecutor also noted: “[After you were] arrested and then [Lowry] giving you the opportunity to tell your side of it and correct any errors, you answer in response to, did it happen, I don’t know.”

The prosecutor continued in a similar vein, highlighting various aspects of the jail interrogation, eventually asking: “So we went from I didn’t do it to I don’t remember doing it to I don’t know. That’s what’s in here, right, ... ?” McPherson responded: “Um-hmm.” The prosecutor further asked: “Now, you recall telling the detective that during the course of your interview, that you wanted to talk, but you just didn’t know what to say?” McPherson responded: “Um-hmm.” The prosecutor asked: “[Even] though you were being confronted with these allegations, you didn’t know what to say?” The prosecutor next questioned McPherson about his concern, as reflected in the interrogation, about how much time he was potentially facing. McPherson answered: “I didn’t know what kind of time I was looking at, so I didn’t know whether I should confide in him everything which I have now told [defense counsel] or whether I should wait and talk to an attorney. [¶] ... [¶] And depending on the time that I was facing, I felt maybe it would be safe to talk to him about it— [¶] ... [¶] —instead of talking to an attorney.” The prosecutor responded: “So you thought an outright denial of the allegations would somehow hurt you in the future?” When McPherson answered, “No,”

the prosecutor continued, “So how about telling [Lowry] you’re crazy; this never happened; never happened; not one time ever? [¶] Did that ever occur to you as an appropriate response?”

At one point the prosecutor asked: “[You told Lowry] I smoke a lot of weed and it messes with my head. [¶] Why are you telling Detective Lowry that you do a lot of drugs, you smoke a lot of weed and it messes with your head in response to child molestation allegations?” McPherson responded: “I had a lot of stuff going through my mind. Part of me wanted to explain my side of the story and tell him what I felt was going on, but at the same time I would start to and I would realize he was not the person to talk to because he was a person trying to get me where we are now.” The prosecutor continued: “When you realized he wasn’t the person you wanted to talk to—in fact, at the very end of the interview, you asked for his card because you still might want to talk, but you really need to talk to a psychiatrist? [¶] ... [¶] You need[ed] to talk to a psychiatrist why?” McPherson answered: “Because I was extremely depressed about what I was being accused of.” The prosecutor countered: “[Y]ou were extremely depressed because you had molested [H.A.] over several years multiple times?” McPherson replied: “Absolutely not.”

The prosecutor also questioned McPherson about his statement to Lowry that he would sometimes cuddle with H.A. and rub her legs: “How did you rub her legs? I’m curious.” McPherson answered: “I would have my hand on her like this on the side of her thigh or on the top of her leg.” In addition, the prosecutor cross-examined McPherson about his interrogation statements to the effect that he had verbally abused members of his family (including H.A.) and regretted the history of yelling and arguments that plagued his family life. When McPherson acknowledged he had expressed such regrets, the prosecutor retorted: “[But] you’re not being accused of yelling during the course of this interview with Detective Lowry. He’s not accusing you of being a bad husband to Jessica and yelling at Jessica. He’s basically telling you about

the allegations of sexual molest on [H.A.].” Then, when McPherson endorsed the prosecutor’s characterization of the thrust of Lowry’s questions, the prosecutor countered: “[Yet] your ... wish there was a rewind button [was about] tak[ing] back yelling at your wife?”

As for closing arguments, the prosecutor repeatedly referred to McPherson’s statements to Lowry there as well. With reference to his statements at the jail, she argued: “Is it reasonable when being confronted with horrible allegations that you answer, when asked are these true and is this what happened and is this a fair summation, I don’t know. You don’t know? You don’t know if you molested a child on multiple occasions as being alleged? You don’t know? How do you forget about something like that?”

The prosecutor subsequently argued, again with reference to McPherson’s statements at the jail: “What do you mean by the fact that you can’t remember years of your marriage when these events are alleged to have occurred? What does that mean? I have no—I don’t know why I made that statement. What do you mean when confronted with these allegations that you don’t know if they are true or not. Your response is: I don’t know if I did that. I don’t know. [¶] But then on the stand, I didn’t do it. Did you do that? No. Did you do that? No. Did you do that? No. Okay. Let’s go back to your interview with Detective Lowry when you had every opportunity to give that firm no that you didn’t molest your stepdaughter, but that’s not exactly how that came out. [¶] What came out was: I don’t know; I don’t remember doing it[]; no, I didn’t do that in Monterey; well, I don’t remember years of that. Then finally, he says: I wish I could hit the rewind button. [Well,] *I wish I could hit the rewind button too so that H.A. didn’t have to come in here and describe in detail to you all the things that happened to her...* [¶] ... [¶] ... [H.A.] hadn’t accused anybody else of touching her, so there’s no excuse for his lack of responses. And think about those lack of responses when confronted in that interview. Did it happen more than 5 times or less? No response.” (Italics added.)

The prosecutor's final words to the jury also referenced McPherson's statements to Lowry: "Did [McPherson] continuously sexually abuse [H.A.] and have we proven three acts during the time period? Yes, we have [done] that beyond any reasonable doubt because his testimony is not reasonable. His testimony in *his statements to Detective Lowry are not reasonable*. So for you to find reasonable doubt, you have to believe that this person here gave reasonable testimony. It's not there." (Italics added.) (See *Quartermain, supra*, 16 Cal.4th at p. 622 [*Miranda* error not harmless because prosecutor's use of the defendant's improperly admitted statement in cross-examination and closing argument undermined the defendant's credibility and "struck at the heart of his defense"]; *Jones v. Harrington* (9th Cir. 2016) 829 F.3d 1128, 1142 [admission of the defendant's confession obtained in violation of his right to remain silent was not harmless, in part, because prosecutor, in closing arguments, repeatedly referred to the defendant's statements and told jury that it "could convict beyond a reasonable doubt based only on [the defendant's] own statements"]; *Garcia v. Long* (9th Cir. 2015) 808 F.3d 771, 782–784.)

Given the importance accorded to the jail statements by the prosecutor in playing the recording for the jury, questioning Lowry about the statements, cross-examining McPherson on the basis of the statements, and spotlighting the statements in her closing argument, it is clear she found the statements to be highly probative of McPherson's guilt. It is not possible for us to conclude beyond a reasonable doubt that the error did not contribute to the verdict obtained.

As for the rest of the prosecution's case, in addition to H.A.'s testimony, the prosecution offered forensic evidence showing that McPherson had repeatedly ejaculated on a bird-patterned comforter that belonged to H.A. The presence of numerous semen deposits on the comforter was offered as circumstantial evidence of the fact that McPherson had molested H.A. This evidence was circumstantial because there was no

evidence that H.A. ever saw McPherson masturbate or ejaculate, or even that she ever saw McPherson's penis during the molestation incidents.

The question whether H.A. exclusively used this comforter or whether it was used by other family members as well was also disputed. While H.A. and Jessica indicated that only H.A. would use the comforter, McPherson testified to the contrary, that the comforter was not exclusively used by H.A., as members of the family used various comforters, including the bird-motif comforter, interchangeably. McPherson also noted that this comforter, along with other comforters, would "get used on the couch or in the living room," where McPherson regularly slept. The jury would reasonably have resolved the conflicting evidence regarding the use of this comforter in the context of McPherson's shattered credibility (on account of his devastating cross-examination based on his jail statements). In this sense, too, the erroneous admission of the jail statements would reasonably have contributed to the jury's verdict.

Ultimately, the semen deposits on the bird-patterned comforter, although undoubtedly probative, were not by themselves, or even in conjunction with H.A.'s testimony, overwhelming evidence of McPherson's guilt. Evidence of bed-wetting and behavioral changes exhibited by H.A. during the relevant period was also simply circumstantial evidence of the ultimate issue in the case.

We conclude the erroneous admission of McPherson's jail statement was not harmless beyond a reasonable doubt.¹⁷ McPherson's convictions must, therefore, be

¹⁷ The People have not argued that the jail statements would have been admissible to impeach McPherson, and we therefore do not address that issue. In any event, we may not assume that McPherson would have testified without the admission, in the prosecution's case-in-chief, of his damaging jail statements. (See *Z.A.*, *supra*, 207 Cal.App.4th at p. 1424, fn. 17; *People v. Bradford* (2008) 169 Cal.App.4th 843, 855 [in cases of *Miranda* error, "prejudice should be evaluated on the basis of the evidence actually presented," without speculating about whether the "defendant would have testified in the absence of the need to respond to his [improperly admitted statement]"]; *Boyer*, *supra*, 48 Cal.3d at p. 280 [in assessing prejudice from *Miranda* error, reviewing court may not assume the defendant would have testified had his improperly admitted extrajudicial statement been excluded]; *People v. McClary* (1977) 20 Cal.3d

reversed. Our disposition makes it unnecessary to address McPherson's remaining contentions.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings consistent with this opinion.

MEEHAN, J.

I CONCUR:

PEÑA, J.

218, 231, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17 [same].).)

LEVY, Acting P.J.

I respectfully dissent from the majority's opinion and its conclusion that prejudice resulted from the introduction of appellant James Earl McPherson's statements to the detective. To the contrary, the introduction of this evidence was harmless beyond any reasonable doubt. As a result, it is unnecessary to address whether a constitutional violation occurred in the first instance because this claim fails due to a lack of prejudice.

A federal constitutional error is harmless when the reviewing court determines beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required if there is a " 'reasonable possibility that the evidence complained of might have contributed to the conviction.' " (*Id.* at p. 23.) An error does not contribute to the verdict when the record reveals it was unimportant in relation to everything else the jury considered on the issue in question. (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) The question is whether the guilty verdict actually rendered in this trial "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

In this matter, any presumed constitutional error was unimportant in relation to everything else the jury considered regarding appellant's guilt, which was overwhelmingly established. Both prior to trial and throughout her trial testimony, the confidential victim (C.V.) consistently and credibly stated that appellant touched her at night. She was often asleep when it occurred, and her back was to him. She would wake up, but at times she pretended to remain asleep. Appellant would reach over her to touch her.

C.V. told the jury that appellant touched her vagina on at least three occasions when he put his hand inside her underwear. Her trial testimony was extremely consistent with her initial statements made to the responding sheriff's deputy. In addition, the jury viewed an audio and video recording of C.V.'s forensic (KIT) interview. This interview

occurred about three days after C.V. informed her mother about appellant's improper touching. During her recorded interview, C.V. consistently stated that appellant touched her during the night on her "privates" while she was clothed. She said appellant touched her multiple times inside her underwear. She stated she was afraid of appellant because he was a "violent person" and she believed he had been to prison.

C.V.'s credible allegations were corroborated by forensic evidence. Appellant left 41 separate deposits of his semen on C.V.'s blanket/comforter (hereinafter blanket). At trial, a senior criminalist described the staining on this blanket as "quite a bit." She opined that these stains represented "multiple occurrences" of ejaculations.

The majority contends that appellant's semen stains were not "overwhelming evidence" of his guilt, even in conjunction with C.V.'s testimony. The majority also discounts the forensic evidence corroborating C.V.'s testimony, claiming a factual dispute existed about whether or not C.V. exclusively used this blanket. (Maj. opn., *ante*, at p. 57.) To support its position, the majority relies solely on appellant's self-serving testimony, wherein he claimed that C.V. did not exclusively use this blanket. The majority's position is untenable.

The blanket containing appellant's numerous semen deposits was on C.V.'s bed when law enforcement recovered it for testing. At trial, both C.V. and her mother confirmed that this blanket belonged to C.V., and it remained on her bed. They denied that appellant ever used this blanket. The lead detective confirmed for the jury that, around the time law enforcement recovered C.V.'s blankets for testing, her mother had reported that only C.V. used the blanket in question.

During his trial testimony, appellant offered only one explanation for why his 41 deposits of semen were on C.V.'s blanket; he claimed that he and his wife had used it repeatedly during sex. He also claimed that they had used this blanket on their master bed. The evidence, however, overwhelmingly contradicted appellant's self-serving claims.

At trial, a senior criminalist opined that appellant's semen stains did not show any evidence of wiping. Instead, these stains had defined edges. "They all appeared to be distinct stains that were deposited directly onto the blanket." Further, the criminalist opined that these 41 stains had not been transferred during washing.

At trial, C.V.'s mother confirmed that she stopped having sex with appellant around Thanksgiving of 2013. About that time, appellant began to sleep on the couch. Their abstinence continued from November 2013 through the time C.V. disclosed appellant's inappropriate behavior in April 2014. At trial, C.V.'s mother denied ever using C.V.'s blanket when having sex with appellant or "to clean up" after having intercourse. She told the jury she last washed this blanket around Christmas of 2013. She remembered that C.V. had peed in bed. She used hot water to wash the blanket. She said appellant never did laundry. She told the jury that their master bed was king sized while this blanket was twin sized.

During cross-examination, appellant said it was never his testimony that he and his wife had had sex 41 times on this blanket. However, he stated that they had used this blanket on their bed. When pressed further, he initially said he did not know how many times he and his wife had sex on that blanket. He admitted, however, that, in the months leading up to these allegations, he and his wife stopped having sex on a regular basis. He believed they had sex about three times from October 2013 through April 2014. When asked to explain the remaining 38 semen deposits, appellant said he and his wife had used the blanket multiple times during sex, but he did not know how many times.

The evidence overwhelmingly established appellant's guilt. The evidence overwhelmingly contradicted appellant's self-serving claim that C.V. did not use this blanket exclusively. The evidence also overwhelmingly contradicted his assertions that his numerous semen deposits were on this blanket because of repeated sex with his wife.

The majority contends that a "significant portion of the People's case" centered on appellant's statements to the detective. (Maj. opn., *ante*, at p. 51.) The majority also

claims that appellant's credibility was "shattered" because the prosecutor effectively cross-examined him using his statements. (*Id.* at p. 57.) According to the majority, it is not possible to conclude beyond a reasonable doubt that appellant's statements did not contribute to appellant's guilty verdict. (*Id.* at p. 56.) The record does not support the majority's assertions.

During the prosecutor's closing argument, which lasts about 19 pages in the record, the prosecutor emphasized that appellant's guilt was established from C.V.'s consistent and credible pretrial statements and her testimony. The prosecutor repeatedly asserted that C.V.'s testimony was corroborated by appellant's 41 separate semen deposits on her blanket. The prosecutor emphasized that appellant lacked any credibility in his ability to explain how the 41 semen stains were left on C.V.'s blanket. Only once during the initial closing argument did the prosecutor briefly mention appellant's interview with the detective. The prosecutor contended that appellant's responses to the detective were not credible.

The prosecutor's rebuttal covers about 11 pages in this record. The prosecutor again emphasized that C.V.'s pretrial statements and her trial testimony had not shown any substantial inconsistencies. The prosecutor also contended that the forensic evidence did not support any suggestion that appellant's wife had cleaned herself with C.V.'s blanket after having sex with appellant. The prosecutor stated that appellant's 41 deposits of semen were "very strong circumstantial evidence" that showed "his intent" when he touched C.V. "multiple times over the course of years." The prosecutor argued that appellant was not credible, and she reminded the jury about his prior felony convictions for burglary, assault and conspiracy. She also commented on appellant's "attitude and demeanor while testifying." She finished her rebuttal by discussing appellant's statements to the detective. She noted that appellant could have given a firm denial to these accusations, but he had instead claimed an inability to remember doing anything. She again commented that her case was based on C.V.'s statements and the

DNA evidence, which corroborated C.V.'s testimony. She concluded her remarks to the jury by asserting that appellant's statements to the detective were not reasonable. She asked the jury to convict him.

Of course, a defendant's confession often has a profound impact on a jury, and it is probably the most damaging evidence that can be admitted against him or her. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) However, our Supreme Court defines a "confession" as a declaration of a defendant's "intentional participation" in a criminal act. (*People v. McClary* (1977) 20 Cal.3d 218, 230, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17.) In contrast, an "admission is merely the recital of facts tending to establish guilt when considered with the remaining evidence in the case. [Citations.]" (*People v. McClary, supra*, 20 Cal.3d at p. 230.)

In this matter, appellant's statements to the detective were far short of a confession and in no way established his guilt. This is true even when considering how the prosecutor used these statements to impeach him during cross-examination. Instead, at best, appellant made equivocal statements that were open to interpretation. He repeatedly told the detective that, if he had touched C.V., he did not remember doing it. He complained of memory problems. However, he also told the detective that he did not understand why C.V. was making these allegations against him, and he said he loved her "with all my heart." He told the detective that he never did the things she was saying, and he denied ever putting his hand inside her pants.

At trial, appellant told the jury that he had been "in shock" and was "devastated" when he had realized the detective was accusing him of touching C.V. inappropriately. He testified that he had felt like the detective had "wanted me to admit to something I hadn't done." He said he distrusted police officers and he had not known "how to explain" his point of view to the detective, and he did not know how to explain himself to the jury. He told the jury that "there was stuff I wanted to say, but I didn't know if I should."

During cross-examination, the prosecutor did use appellant's inconsistent statements to the detective to impeach his credibility. However, at no time did appellant ever confess to committing a crime. Appellant's credibility was overwhelmingly impeached by evidence unrelated to this interview. The jury learned that appellant had prior felony convictions for first degree burglary, assault and conspiracy, and he had served a prior prison term. The jury learned that appellant was heavily involved with pornography. According to his wife, appellant had "adult porn and teen porn" and he would "lock himself in the bathroom and would masturbate." Appellant admitted to the jury that he watched porn and it stimulated him.

In addition to the evidence about appellant, the jury heard other facts that overwhelmingly impeached his credibility and refuted his denials at trial that he committed the crimes. During her KIT interview, which the jury viewed, C.V. said she was afraid of appellant, whom she described as a "violent" person. She believed he had been to prison. The jury saw that C.V. was very emotional throughout her entire 45-minute KIT interview. The jury learned that C.V.'s behavior changed around the time appellant began to touch her inappropriately. C.V.'s mother described her as "bubbly and outspoken" before these events occurred. Afterward, C.V. became "more withdrawn, very shy" and she began wetting her bed more frequently. C.V.'s grandmother testified that in 2011 C.V. was very "withdrawn" and she had bed-wetting issues. "She had extremely bad night terrors." This went on for a prolonged period of time. Appellant's stepmother testified that in 2012, C.V. appeared "kind of bummed" and withdrawn when appellant, C.V. and C.V.'s mother moved to Arizona. Appellant's stepmother, however, believed that C.V.'s reaction occurred because of "issues" with friends.

During his cross-examination, appellant told the jury that he thought C.V. had made up these allegations "as a tool to keep my son out of my life." He believed C.V. had been coached to make these allegations. However, he agreed that C.V. had cried throughout her entire 45-minute KIT interview. He admitted he did not know if she had

been coached to cry or not. The prosecutor finished her cross-examination with this question: “You saw the [KIT] interview. You saw [C.V.] testify. And your explanation, even though [your wife] has allowed you, even after the allegations came out, to see your son, that [C.V. is] part of this conspiracy to keep your son away from you?” Appellant answered, “Yes.”

During the prosecution’s rebuttal, C.V.’s mother denied ever trying to keep appellant’s son away from him. She admitted that, in the summer after these allegations came to light, their son stayed with appellant for a month. She denied ever coaching C.V. to fabricate multiple incidents of child molest to assist in a divorce or child custody proceedings. The jury learned that, on September 9, 2014, a family court granted appellant supervised visitation rights with his son. However, on October 20, 2014, appellant failed to appear for a scheduled family court appearance. The family court suspended appellant’s contact with his son pending a further order.

Our Supreme Court has held that, if a defendant’s confession is erroneously admitted into evidence at trial, a reviewing court may nevertheless find that error harmless from its evaluation of the entire record. (*People v. Cahill, supra*, 5 Cal.4th at p. 511.) Even when a defendant’s confession or admission is improperly admitted into evidence, our high court has found no prejudice when the record otherwise overwhelmingly establishes guilt. (*People v. Jablonski* (2006) 37 Cal.4th 774, 816–817 [“overwhelming evidence” rendered harmless any presumed error in admitting the defendant’s statement, which prompted him not to testify at trial]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 60 [apart from the defendant’s statements to law enforcement, evidence of intent to kill was overwhelming]; *People v. Johnson* (1993) 6 Cal.4th 1, 33 [defendant’s equivocal statement to officer “that he ‘probably did it’ ” was harmless in light of strong incriminating evidence properly admitted at trial]; *People v. Sims* (1993) 5 Cal.4th 405, 447–448 [apart from two confessions, evidence overwhelmingly established the defendant’s intent to kill].)

Here, apart from appellant's equivocal statements to the detective, which in no way can be construed as a confession, the evidence conclusively established appellant's guilt. Both prior to trial and throughout her trial testimony, C.V. consistently and credibly established that appellant touched her inappropriately. Contrary to the majority's claims, the evidence overwhelmingly established that the disputed blanket belonged to C.V., which was on her bed when law enforcement recovered it. The evidence clearly established that appellant's 41 deposits of semen were not left on this blanket because of sex with his wife. Apart from appellant's ambiguous statements, the prosecution had overwhelming proof of his illegal conduct. It is abundantly clear that the jury rejected appellant's self-serving testimony, not because of his disputed statements to the detective, but because the remaining evidence directly and convincingly contradicted him. Appellant's trial testimony was inherently unreliable, and his disputed statements to the detective in no way established any of the charged crimes. In light of the strong incriminating evidence that was properly admitted at trial, reversal of appellant's judgment is neither warranted nor proper in this situation. (See *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 816–817; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 60; *People v. Johnson*, *supra*, 6 Cal.4th at p. 33; *People v. Sims*, *supra*, 5 Cal.4th at pp. 447–448; *People v. Cahill*, *supra*, 5 Cal.4th at p. 511.)

Based on this record, overwhelming direct and circumstantial evidence established that appellant engaged in continuous sexual abuse of C.V. in violation of Penal Code section 288.5, subdivision (a). The evidence also abundantly established that he committed a lewd act upon C.V. in violation of Penal Code section 288, subdivision (a). The presumed error in admitting appellant's statements to the detective did not contribute to the jury's verdicts. This disputed evidence was unimportant in relation to everything else the jury considered regarding appellant's guilt. (See *Yates v. Evatt*, *supra*, 500 U.S. at p. 403.) In other words, the guilty verdicts actually rendered in this trial were surely unattributable to the presumed error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at

p. 279.) As such, the admission of appellant's statements to the detective was harmless beyond any reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

LEVY, Acting P.J.